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**THESIS**

**THE UNITED STATES AND ASSASSINATION POLICY:  
DILUTING THE ABSOLUTE**

by

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December 2003

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**THE UNITED STATES AND ASSASSINATION POLICY:  
DILUTING THE ABSOLUTE**

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Submitted in partial fulfillment of the  
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## **ABSTRACT**

The U.S. has reached a crossroads with its policy regarding assassination. Executive Order 12333, which explicitly and absolutely prohibits assassination, is still in effect. The ban, however, has been diluted and circumvented since its inception. Past administrations have targeted enemy leaders with “indirect” strikes such as the 1986 attacks against Libya and the 1998 missile strikes in Afghanistan and Sudan. Currently, the U.S. deliberately targets individual enemies, whether in the context of an armed conflict, such as Afghanistan or Iraq, or in the war on terror, such as the November 2002 Predator Hellfire missile strike in Yemen. This ostensibly duplicitous policy has caused controversy for the U.S., both internally among policy makers, military leaders, operatives, and the American public, and externally with the international community.

This thesis examines the evolution of U.S. assassination policy, and proposes recommendations for modernizing the Executive Order. The intent is to provide decision makers with a clear point of reference, and a framework for determining when assassination is the best—or at a very minimum, the “least bad”—possible option for dealing with the complex and dangerous threats of modern conflict.

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## **I. INTRODUCTION**

### **A. RECENT ASSASSINATION EPISODES**

On the morning of July 23, 2003, Special Operations Forces from Task Force 20 rang the bell on the gate of a mansion in Mosul, Northern Iraq. The owner of the residence answered and was quickly hustled away by U.S. forces. After calling with a bullhorn for the remaining occupants to surrender, commandos entered the residence, only to be met with a fusillade of gunfire. The assault team retreated and turned the operation over to forces from the 101<sup>st</sup> Airborne, who had cordoned off the area and surrounded the target building. In the ensuing attempt to dislodge the building's occupants, U.S. forces engaged their foes with heavy weapons, grenades, helicopter-fired missile and small arms fire in a four-hour engagement (Nordland & Thomas, 2003). The U.S. forces were targeting the number two and three most wanted High Value Targets (HVTs) in Iraq, Saddam Hussein's sons Uday and Qusay. In the end, Uday and Qusay Hussein (along with a bodyguard and Qusay's teenage son) were dead, riddled with bullets. U.S. forces put their corpses on display to leave no doubt to the Iraqi people and the world that the Hussein regime's reign of terror was over.

The first salvos of Operation IRAQI FREEDOM (OIF), the U.S.-led invasion of Iraq, were Defense Department-coined "Decapitation Operations;" precision-guided munitions strikes based on actionable intelligence and aimed specifically at Saddam Hussein and his regime's leaders. On April 8, 2003, an Air Force B-1 bomber dropped four 900 kg bunker-penetrating Joint Direct Attack Munitions (JDAMs), leaving an eight-by-fifteen meter crater where Saddam Hussein and his sons had allegedly gathered minutes prior to the strike (Nakhoul, 2003). The U.S. made it unwaveringly clear that Saddam Hussein and his cronies were legitimate targets of lethal force throughout the campaign.

On November 3, 2002, a CIA-operated Predator UAV fired a Hellfire missile into a vehicle in Yemen, vaporizing the car and its occupants, including a known terrorist and his associates. This action took place far from what is generally considered the front lines of the war on terror; the killings, apparently also sanctioned by Yemen's

government, were the first publicized U.S. eliminations of terrorists outside of Afghanistan.

What is the significance of these high-profile operations? If we compare them to operations prior to the September 11, 2001 (I will use “9/11” to reference this date) terrorist attacks, it is clear they demonstrate a definitive departure from standard U.S. assassination policy of the last three decades.

## **B. DILUTING THE ABSOLUTE**

In 1975, the Church Congressional Committee revelations alleging CIA “Rogue Elephant” behavior in plotting to assassinate various foreign leaders led President Ford to issue an Executive Order banning political assassinations. This policy was further clarified by President Reagan in his 1981 Executive Order 12333 which explicitly stated, “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination” (Addicott, 2002). Assassination is considered a murderous and treacherous act under international law statutes. Over the last two decades, however, the U.S. has found ways to avoid explicit violation of the ban while still targeting enemies for elimination. By focusing attacks on situational targets (training camps, government compounds) rather than specific individuals, military action has circumvented strict legal interpretation of the Executive Order and international law. Two high-profile cases in point are the bombing of Mu’ammar Gadhafi’s living quarters in 1986 and the attempt to kill Osama bin Laden with cruise missiles in 1998. During Operation DESERT STORM in 1991, U.S. military and political leaders were quick to dubiously assert that U.S. forces were not directly targeting Saddam Hussein for assassination, despite very precise bombing of his last-known locations.

The apparent duplicity and confusion in U.S. assassination policy caused inordinate hand wringing and frustration at the operational and tactical level for military leaders and intelligence operatives throughout the 1980’s and 1990’s. During the 1990’s, the U.S. encouraged internal rebellion in Saddam Hussein’s Iraq. Yet in 1995, CIA agent Robert Baer was subjected to a humiliating and ultimately career-ending FBI investigation for supposedly violating Executive Order 12333 in a conspiracy to murder Saddam Hussein (Baer, 2002, p. 5). During the Soviet occupation of Afghanistan in the 1980’s, the U.S. provided enormous covert support to the mujahideen fighters. However,

the CIA went through extreme operational and tactical contortions to avoid even the most remote connection with perceived targeted killing of Russian officers. In fact, due to fear of Congressional accusations of assassination efforts, the CIA refused to provide long-range sights for sniper rifles despite massive weapons and ammunition support (Crile, 2003, p. 361).

Today, there appears to be no such fear or hesitation in the targeted killing of individuals. The 9/11 terrorist attacks on U.S. soil produced a profound and, perhaps, necessary change to the U.S.'s counter-terrorism policies. On September 14, 2001, the U.S. Congress passed a joint resolution authorizing the use of armed force against nations, organizations, or persons that the President determined had planned, authorized, committed or aided the terrorist acts of 9/11. Additionally, according to press reports, President Bush ordered the CIA "to undertake its most sweeping and lethal covert action since the founding of the agency in 1947" (Carroll, 2001); this directive allowed the CIA to conduct a "targeted killing campaign" against Osama bin Laden and selected members of his Al Qaeda network. President Bush provided written legal authority (without requiring further authorization) for the CIA to eliminate terrorists from an approved list if "capture is impractical and civilian casualties can be minimized" (Risen & Johnston, 2002). The Bush administration has legitimized lethal force by classifying al Qaeda as enemy combatants in a terrorist war against the U.S. At least one of the terrorists killed in the Yemen operation was allegedly on this Presidential "hit-list."

Despite this legitimization of targeted force against individuals, however, there has been no overt or stated change to Executive Order 12333. Each new president is required to sign pre-existing executive orders if the order is to continue as administration policy. Executive Order 12333 remains in effect, standing in the face of what appears to be a liberalized assassination policy. Many argued that the CIA action in Yemen was an assassination or, by Amnesty International's definition, an "extra-judicial execution;" and was a violation of the standing Executive Order. Similarly, following the killing of Uday and Qusay Hussein, Congressman Charlie Rangel argued publicly on the Fox News program *Hannity and Colmes*, that U.S. forces had acted illegally and clearly violated the assassination ban.

Valid or not, these arguments raise questions about the relevance and appropriateness of Executive Order 12333. In 1992, Roger Herbert explored the subject of U.S. assassination policy in his thesis entitled, *Bullets with Names: The Deadly Dilemma*. Herbert's thesis is a useful point of departure from which to launch my own exploration of U.S. assassination policy, especially in light of recent and current events. I will use Herbert's thesis as a baseline and springboard for a policy analysis in modern context.

U.S. assassination policy deserves review. Since Herbert's thesis eleven years ago, the U.S. has indeed "turned the corner" on its assassination policy, though not in readily apparent ways. President Bush has not rescinded the Executive Order banning assassination; it still stands, as ambiguous as ever, with no additional definitional or implicative clarification, no modification, and no additional legislation. However, the Bush administration has further diluted the ban through the reported covert "intelligence finding" which authorized the assassination campaign against Al Qaeda following the 9/11 attacks.

### **C. THESIS ROADMAP**

Given the post 9/11 authorizations of President Bush, the question is no longer "if" in terms of the U.S. engaging in assassination, but rather "how" the U.S. should continue its current policy of allowing targeted killing/assassination. Should 12333 be ignored, abandoned, or reinterpreted? When is assassination legitimate, or illegitimate? When is it practical, or impractical? This thesis will address these topics in detail. First, I will review and summarize Roger Herbert's arguments, establishing the relevance and context in relation to current events. I will define assassination, distinguishing the differences among what is commonly understood as assassination, what assassination really is, and what the emerging policy of targeted killing of enemy combatants permits as an essential facet of the "war on terror" since 9/11. Through detailed case analysis, in particular the Yemen assassination, I will thoroughly examine the moral, ethical, political, legal, and practical tensions surrounding such a policy. Additionally, I will attempt to establish a framework for determining the criteria in employing assassination as a practical, useful, and legal/ethical instrument of foreign policy, and determine who is best suited to execute this policy. I will examine the Israeli example and its relevance to

U.S. assassination policy. Finally, I will offer prescriptions and recommendations for changes to current assassination policy.

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## II. PAST ANALYSIS: DEFINING THE UNDEFINABLE

### A. BULLETS WITH NAMES

In 1992, LT Roger Herbert explored the subject of U.S. assassination policy in his Naval Postgraduate School thesis entitled, *Bullets with Names: The Deadly Dilemma*. Herbert's work is a useful point of departure from which to conduct examination of U.S. assassination policy, especially in light of recent and current events. In my thesis, I will not attempt to re-review the history behind and evolution of the ban; Herbert's work provides a detailed, thorough examination of assassination history and the controversies surrounding U.S. assassination policy. I will, however, summarize his findings, and throughout my thesis will refer back to his analysis as a comparative device in my own examination of the topic.

In *Bullets with Names*, Herbert covers the origins of assassination as a political instrument and discusses the use of assassination in American foreign policy. He includes as case studies the famous Yamamoto assassination in World War II and the Phoenix Program's assassinations throughout the conflict in Vietnam. Herbert details the mid 1970s Congressional Committee inquiries, including Nedzi, Pike and Church, which reviewed alleged misdeeds and developed the basis for the Executive Order banning assassination. He discusses the frictions associated with this absolute policy, including the difficulties that arise from excluding assassination from warfighting at both the national and sub-national level, especially in counterinsurgency operations. Herbert covers assassination and deterrence, and details the challenges and costs associated with a democracy practicing assassination in view of *realpolitik*.

Herbert argues that utilitarian considerations would view assassination as the most moral and precise application of deadly force. However, the "draconian" practice of assassination as an instrument of foreign policy would contradict the U.S.'s democratic ideals. Herbert maintains that although assassination may appear useful in the short term, assassination "cannot support long-term U.S. policy goals or warfighting efforts. Ultimately, such methods could weaken America's global position" (Herbert, 1992, p.

viii). Therefore, in Herbert's view assassination has no place in America's warfighting arsenal.

Herbert does argue that Executive Order 12333's ban on assassination is flawed, dysfunctional, and requires re-evaluation. The mid 1970s Congressional Committee findings "shaped the American perception of political assassination as conspiratorial murder- repugnant, lurid and laughingly ineffective" (Herbert, 1992, p. 15). Actions that caused this perception were the types the ban justifiably sought to outlaw, but the very lack of definition within the text of the executive order leaves plenty of room for 'assassination' to include actions that differ in kind and degree from classic scenarios (Herbert, 1992, p. 15). The order treats assassination as an absolute, but the issue of assassination in American foreign policy is a dilemma, not an absolute. If the U.S. is to survive the changing patterns of the global environment, U.S. leaders should have a framework for decision making with regards to assassination that is just as capable of change and adaptation to new threats and situations. Herbert states, "The best prescription for preserving a necessary degree of ambiguity while protecting American credibility abroad, is to rescind the assassination ban and normalize American policy toward assassination" (Herbert, 1992, p. 133).

In advancing his argument that assassination has no place in U.S. foreign policy, Herbert outlines three arguments favoring ban rescission and six arguments against using assassination based on "practical constraints and philosophical complexities" (Herbert, 1992, p. 120). His pro-assassination arguments suggest, first that assassination may be an effective instrument for waging war in a low intensity conflict, counterinsurgency war, or war against terrorists. The ban "throws out the baby with the bathwater" in absolutely denying and making legally ambiguous these warfighting options. Second, assassination serves a greater moral purpose with its precise application of deadly force, limiting indiscriminate warfare and thus saving lives. Additionally, assassination may save countless lives if the target is a particularly nefarious individual such as Adolf Hitler or Saddam Hussein. Third, rescinding the ban would send an unambiguous message to the U.S.'s enemies and may serve a deterrent purpose (Herbert, 1992, pp. 119-120).

Herbert's anti-assassination arguments declare, first, that assassination is a highly complex operation with no guarantee of success. Second, it is difficult to identify whom among the U.S.'s intelligence operatives, military personnel or contracted surrogates should carry out an assassination. Third, there is minimal evidence suggesting an assassination will accomplish its designed purpose, given that the outcome cannot be guaranteed. Fourth, it is hard to predict who will fill the target's position once eliminated (in a political or military leader scenario, who would be the successor?); those who succeed the assassinated individual may become an even greater threat. Fifth, an active assassination policy may invite retaliation in kind against U.S. leaders. Sixth, rescinding the assassination ban contradicts democratic norms and could erode the U.S.'s global credibility as a leader not only in military and economic power, but also in ideals (Herbert, 1992, pp. 120-122).

Herbert recommends policy normalization. The U.S. should establish some measurable standard of action, then use that standard to determine whether an assassination is an appropriate action for the situation at hand. Herbert advocates that decision makers avoid using legal frameworks, instead concentrating on America's institutional frameworks for moral judgment. He uses as an example the Congressional policy formulated following the Church committee hearings. "Congress sought to arrest the pattern of executive excesses not by imposing specific constraints, but rather by improving the process by which decisions are made" (Herbert, 1992, p. 129). He cites the Intelligence Oversight Act of 1980, which expanded the 1974 Hughes-Ryan Amendment's reporting procedure requirements to ensure clear lines of authority for covert operations. Herbert feels that normalizing assassination policy with this approach will subject assassination issues to governance "by the same institutions, laws and guidelines which regulate foreign intervention of any kind," which supports "the long and successful tradition of controlling its leaders through democratic institutions" (Herbert, 1992, p. 130).

Indeed, in the post 9/11 world, the U.S. has normalized its policy, but not in the form Herbert suggests. Rather, the U.S. has normalized assassination policy through the current administration's approach, which includes a highly classified "intelligence finding" that formalizes the Bush administration's guiding principles for the "war on

terror.” The ban is still in effect, but the U.S. targets specific personnel for elimination, assassination, killing—and whatever the euphemism, the current administration is operating in clear violation of its own self-imposed absolute constraints. In Chapter VI, I will address Herbert’s argument that the U.S. should develop a framework for decision makers in order to aid in the normalization process of assassination policy. I will also argue in the successive chapters of this thesis that today, over a decade later, several of Herbert’s arguments against using assassination as an instrument of foreign policy are largely irrelevant or invalid.

## **B. DEFINING ASSASSINATION: CONTEXT IS EVERYTHING**

Assassination is not a word that should be used lightly by anyone, due to its decidedly iniquitous connotations. There are many problems in attempting to define assassination, especially considering the term carries numerous implications and nuances depending on its context. The difficulty in determining the difference between “assassination” and “murder” is similar to the age-old argument as to the differences between “terrorist” and “freedom fighter,” or “euthanasia” and “mercy killing.” Method and motivation are differing but overlapping concepts interacting in a complex and contradictory world. Add to this tangle the grey area between peace and war, with the subsequent legal and political debate over where in the spectrum of conflict President Bush’s declared “War on Terror” belongs, and we have a murky view at best of the role assassination plays in foreign policy. Compounding this problem is the fact that Executive Order 12333 bans something it chooses not to define, leaving ample room for interpretation, dilution and controversy.

The Merriam-Webster dictionary defines the verb assassinate as, “to injure or destroy unexpectedly and treacherously,” or “to murder by sudden or secret attack usually for impersonal reasons” (“Assassination,” 2003). The idea of “treachery” is central to much of the negative connotation associated with assassination; it implies something intrinsically unfair and deceitful.

Amnesty International goes further in defining assassination; the organization uses the word in context and defines political assassinations as “extrajudicial executions”.

An extrajudicial execution is an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extrajudicial killings

are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework. (Amnesty International, 2001)

Obviously, being a human rights organization, Amnesty International stresses the “fairness” aspect of assassinations (execution without fair trial). Their definition is too specific and limiting, however, to apply to assassination in modern conflict’s context. “Extrajudicial” implies that there is a legal way to bring an individual to justice without killing him. In war and even in some law enforcement scenarios, however, lethal force is not only justified but also preferred to bring about resolution to a conflict.

Numerous scholars and analysts have attempted to tackle assassination’s definition, especially in the context of conflict. General Sir Hugh Beach and David Fisher from the International Security Information Service define assassination as, “the murder of an important person in a surprise attack for political or religious reasons” (Beach & Fisher, 2001). Bruce Berkowitz defines assassination as “deliberately killing a particular person to achieve a military or political objective, using the element of surprise to gain an advantage” (Berkowitz, 2003). Additionally, according to Berkowitz assassination knows no rank, and it does not matter how the target is killed. Kevin A. O’Brien illustrates the problems of defining assassination with enough interpretive depth to relate to a low intensity conflict or counterinsurgency environment, in his study *The Use of Assassination as a Tool of State Policy: South Africa’s Counter-Revolutionary Strategy 1979-1992*. He sees the key factors in separating assassination from murder as “the motivation of the act, the relevance and importance of the target in effecting a political outcome through its removal, and the singularity of the target...” (O’Brien, 1998). In his contextual approach, O’Brien’s seeks to place a particular act within boundaries defined by key elements rather than an absolute classification.

During an Academic Panel discussion of the purposeful downing of Yamamoto’s plane in World War II, Paul B. Woodruff argued that assassination falls outside the boundaries presented by theaters of war. “In an assassination, nonuniformed personnel behind the lines gain access by stealth to an enemy leader (who may also be non-uniformed) and kill him” (as cited in Herbert, 1992, p.26). Herbert argues that although

Woodruff's view does describe an assassination scenario, the current ban contains no such distinctions and, therefore, cannot be so narrowly defined. Contextually, the Yamamoto action constituted a political assassination. Herbert also cites Dale Andrade, who argues in his book *Ashes to Ashes* that (in reference to the Vietnam Phoenix Program), "The distinction seemed to be that if the attackers did not know the identity of those they killed it was war; if they did, it was assassination" (as cited in Herbert, 1992, p. 35). In terms of Woodruff's view, Berkowitz argues that it does not make a difference what the instrument of the assassination is, whether it is a non-uniformed personnel bullet (as long as it is not perfidious, outlawed by the conventions of lawful armed conflict), or precision-guided munitions launched by a tactical fighter-bomber or a Predator drone, armed with Hellfire missiles and loitering overhead unbeknownst to the targeted personnel. In the end, people direct and provide the precision for these killings, no matter what weaponry used. The only real difference is the method and sterility of remote versus face-to-face killing.

Roger Herbert's views are similar to O'Brien's. Herbert contends that it is not important to define the term "assassination" especially since the existing ban provides no clarifications beyond using the word. Instead, Herbert establishes boundaries "within which a reasonable person might interpret a governmental action to be political assassination" that allows the prudent government official to establish criteria "which satisfy his colleagues and superiors in government, the American public and his own moral standards" (Herbert, 1992, p. 15). Herbert uses two definitions to establish his criteria. The first, from Franklin Ford, is "the intentional killing of a specified victim or group of victims, perpetrated for reasons related to his public prominence and undertaken with a political purpose in view" (Ford, 1985, p. 2). The second definition from David Newman and Tyll Van Geel describes assassination as "condoned by a responsible official of a sovereign state action expected to influence the policies of another nation" (as cited in Herbert, 1992, p. 17). From these two definitions, Herbert establishes a three-prong criterion for an action to be considered an assassination: Authority of a state official; intent to influence policies of the targeted national (or sub-national) entity; and, a specifically identified victim (Herbert, 1992, p. 18). If we inject Berkowitz and O'Brien's analysis into the criteria, we can even further enhance the criteria. Not only do

assassinations have authority of a state official, but they are also “systemic, systematic, planned and executed using elements of a statal structure” (O’Brien, 1998). “Intent to influence policy” addresses the motivational aspect, which O’Brien alludes to, with the amplifying goal of achieving a military or political outcome/objective. Additionally, the specifically identified victim “can be anyone from leaders to the lowest common denominator” whom the state *perceives* to be affiliated with a political opponent or enemy of the state (O’Brien, 1998). With these amplifications, my thesis accepts Herbert’s framework.

For the purposes of this thesis, I will define assassination using the following criteria. Assassination is the deliberate killing of a specific individual, regardless of rank or political stature, whom the state perceives as an important enough threat to eliminate when there is no possibility of capture or judicial recourse. Assassinations are carried out under the authority of a state, and are planned and executed using elements of the state’s structure (military, police, intelligence, etc.). Assassinations occur with the intent and motivation to influence or achieve a political or military objective/outcome, regardless of whether the state is considered at “war” or “peace” with its perceived enemies.

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### **III. U.S. ASSASSINATION POLICY BEFORE 9/11**

#### **A. THE EXECUTIVE ORDERS**

In the aftermath of the Congressional Committee hearings of the mid 1970s, President Gerald Ford issued the first Executive Order specifically banning assassination. Executive Order 11905, Section 5 (g) stated, “No employee of the United States Government shall engage in, or conspire to engage in, political assassination” (Executive Order 11905, 1976). President Ford also supported additional legislation making assassination a crime. One such piece of legislation was the National Reorganization and Reform Act of 1978, S.2525. Introduced by Senator Walter Huddleston (D-Kentucky) and Representative Edward Boland (D-Massachusetts), the act would have specifically prohibited the assassination of foreign officials in peacetime. It was never ratified (Herbert, 1992).

President Carter’s Executive Order 12036, Section 2-305, stated, “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination” (Executive Order 12036, 1978).

President Reagan was the last president to specifically address assassination in an Executive Order, 12333. Section 2.11 repeats Carter’s verbiage exactly (Executive Order 12333, 1981). Although all the Executive Orders contain a specific section dedicated to definitions, none of the presidents chose to define assassination.

#### **B. REAGAN AND ASSASSINATION**

In *Bullets with Names*, Roger Herbert discusses how Reagan was the first president to test the ban, five years after he signed the Executive Order. On April 15, 1986, during a period of heightened tensions with Libya, the U.S. launched Operation EL DORADO CANYON. This bombing raid against Libyan infrastructure targets was in response to a series of military provocations and Libyan-sponsored terrorist attacks, which culminated in a Berlin discotheque bombing that killed three people, including one American, and injured some 200 others. The raid drew criticism and controversy when it appeared the U.S. had deliberately targeted Qaddafi; one of the targets was his

compound. Qaddafi escaped harm, but his 15-month-old adopted daughter was killed in the raid (Wise, 2003b).

Despite administration insistence that the raid was not an attempt on Qaddafi's life, many argue that there is reasonable evidence to the contrary. William F. Buckley, Jr., for example, argues that if the raid was not, amongst other things, an assassination attempt, 'then a great many people went to unnecessary pains to try to establish exactly where Qaddafi would be sleeping on the night of April 14, 1986. (Herbert, 1992, p. 59)

Then Secretary of State George Schultz stated, "He [Qaddafi] was not a direct target...we have a general stance that opposes direct efforts of that kind, and the spirit and intent was in accord with those understandings" (as cited in Herbert, 1992, p. 59). The insinuation was that indirect attempts (i.e. "area" weapons such as bombs dropped from aircraft) did not constitute a violation of the ban. This same intimation would surface during the late 1990s when the Clinton administration similarly tested the limits of the assassination prohibition.

Interestingly, in 1988 the U.S. Department of Defense (DoD) promulgated DoD Directive 5240.1 (DoD Intelligence Activities). Paragraph 4.4 of the directive states, "Under no circumstances shall any DoD employee engage in, or conspire to engage in, assassination" ("DoD Directive", 1988).

### **C. INTERNAL AGITATION**

Meanwhile, the repercussions of the various congressional committee investigations proved difficult for the U.S. intelligence community, especially in the area of assassination. The Ford, Carter and Reagan Executive Orders specifically targeted CIA operations and severely limited actions during covert operations. The 1977 "Halloween Massacre" at the CIA was an administrative purge of literally thousands of intelligence officers, mostly from the paramilitary side of covert operations (McClintock, 1992). The paranoia resulting from the reforms reverberated all the way to the tactical level. "Even the CIA's most daring operatives had come to dread the prospect of having their careers destroyed for carrying out missions that Congress might later deem illegal" (Crile, 2003, p. 14).

Following the Soviet invasion of Afghanistan in December 1979, the U.S. gradually built up its support of the rebel Mujahideen fighters, reaching \$1.2 billion in

covert aid by its peak in 1986 (Crile, 2003, p. 410). Despite the enormous amount of supplies, equipment and weapons being funneled through Pakistan and into mujahideen hands, CIA operatives were extremely cognizant of the limitations that the Executive Orders prohibiting assassination imposed on them. “The Agency’s lawyers, not to mention high-ranking officials...were adamant about not becoming involved in anything remotely resembling assassination” (Crile, 2003, p. 350). Although Pakistani Inter-Services Intelligence Directorate (ISI) officers taught Afghan fighters how to identify and target higher-ranking Soviet officers, Gust Avrakotos, chief of Afghan operations during the mid 1980s, “was careful never to associate the Agency with such activities- that would be a political time bomb” (Crile, 2003, p. 350). John McMahon, Deputy Director of Central Intelligence (the CIA’s number two man) from 1982 to 1986, refused to provide items such as long-range sniper rifle sights to the mujahideen “out of fear that Congress might accuse the CIA of supporting assassination efforts” (Crile, 2003, p. 361). It is extremely ironic that while President Reagan was dropping bombs on Libya in the hope of killing Qaddafi, the CIA was tying its own covert operators’ hands to avoid assassination perceptions in Afghanistan.

#### **D. BUSH AND ASSASSINATION**

The first President Bush, perhaps sensitive to assassination implications due to his reign as head of the beleaguered CIA in 1976-1977, invoked the assassination ban as “a specific limiter to actions during the first year of his administration” (Herbert, 1992, p. 60). In *Bullets with Names*, Herbert discusses how President Bush claimed the assassination prohibition was an unreasonable restraint for U.S. military officers and intelligence operatives in providing support to coup plotters during the failed October 3, 1989 attempt to overthrow Panamanian dictator General Manuel Noriega (Herbert, 1992). If Noriega had been killed during the coup, critics could accuse the U.S. operatives on the ground aiding coup leaders of violating the Executive Order. Following this incident, President Bush and the Intelligence Committees determined, “a decision by the President to employ overt military force...would not constitute assassination if U.S. forces were employed against the combatant forces of another nation, a guerilla force, or a terrorist or other organization whose actions pose a threat to the security of the U.S.” (Herbert, 1992, p. 135). Thus the Bush administration added a contextual element to determining

whether an action constituted a “banned” assassination; the prohibition would not apply if the U.S. engaged various threats to U.S. security with overt military force.

Despite this contextual qualification, the Bush administration publicly denounced any accusation of violating the assassination ban as evidenced by actions and rhetoric during Gulf War I, 1990-1991. After Iraq invaded Kuwait in 1990, President Bush authorized the CIA to make an effort to topple Saddam Hussein. In his book *The Commanders*, Bob Woodward reports, “The CIA was not to violate the ban on assassination attempts, but rather recruit Iraqi dissidents to remove Saddam from power” (as cited in Lowry, 2003). Sensitivity to potential assassination accusations ran high; Secretary of Defense Dick Cheney fired Air Force Chief of Staff General Michael Dugan for “telling reporters that the U.S. wanted to ‘decapitate’ the Iraqi regime by killing Saddam and his family” (Lowry, 2003). Cheney stated, “We never talk about the targeting of specific individuals who are officials of other governments” (as cited in Lowry, 2003). General Norman Schwarzkopf also announced, “The United States does not have a policy of trying to kill any particular individual” (as cited in Herbert, 1992, p. 62). Yet none of the rhetoric stopped U.S. forces from repeatedly bombing several of Saddam Hussein’s frequented locations and personal compounds throughout the war.

#### **E. CLINTON AND ASSASSINATION: THE AGITATION CONTINUES**

In his book *See No Evil*, ex-CIA agent Robert Baer relates an example of the politics behind the assassination ban. Baer was in charge of a clandestine base in Northern Iraq in the mid-1990s, and was part of an effort to organize Iraqi dissident groups to topple Saddam Hussein. The effort proved fruitless, however, when the Clinton administration pulled the plug on the operation at the last minute in March 1995, even after tacitly approving it for months while dissident elements positioned themselves for a coup. According to Baer, the Clinton administration and National Security Advisor Tony Lake desired a nonviolent overthrow of Hussein’s regime. This did not reflect the reality of the planned coup, however, and when this news reached the administration, Lake personally blocked the operation from proceeding (Baer, 2002, p. 175).

The story does not end there, however. In February 1995, Ahmad Chalabi, head of the Iraq dissident groups, met with Iranian intelligence officers hoping to acquire Iran’s support by persuading the officers that the U.S. was serious about overthrowing

Hussein. To convince them, Chalabi “told the Iranians the U.S. finally had decided to get rid of Saddam- to assassinate him. To carry it out, he said, the National Security Council had dispatched an ‘NSC team’ headed by Robert Pope to northern Iraq. The NSC...had asked him to contact the Iranian government on its behalf to ask for help” (Baer, 2002, p. 6). Additionally, Chalabi forged a letter, which he deliberately let the Iranians see, that asked Chalabi to give this Mr. Pope “all assistance requested for his mission” (Baer, 2002, p. 6). U.S. intelligence sources picked up a report of this meeting, and not knowing that Chalabi had concocted a lot of bogus information, Tony Lake demanded an investigation. When Baer returned to Langley, FBI agents were waiting to inform him he was under investigation for violating Executive Order 12333. They thought Baer had used “Mr. Pope” as an alias, and had ordered Hussein’s assassination. After shifting the allegations to federal murder-for-hire violations under Title 18, sections 1592 and 1598, the government eventually dropped the charges. Baer passed multiple polygraphs and there was simply not enough evidence to prosecute him, especially considering that Chalabi had invented the whole thing (Baer, 2002, p. 217). Nonetheless, this was the beginning of the end of Baer’s CIA career. This incident illustrates the sensitivities, internal politics, and fear surrounding the Executive Orders’ prohibition on assassination.

In the late 1990s, President Clinton tested the ban in quite the same way President Reagan did in the previous decade. In 1998, terrorists conducted near-simultaneous attacks on the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Over 224 people were killed, including 12 Americans. The U.S. linked these attacks to the Al-Qaeda terrorist organization, and two weeks after the bombings President Clinton ordered a Tomahawk cruise missile strike against a training camp in Afghanistan and an alleged chemical weapons plant in Sudan. U.S. intelligence sources believed Osama bin Laden would be at a meeting at the camp in Afghanistan. Reportedly, bin Laden was at the camp only hours before the strike, but he escaped unharmed (Risen, 2001). Additionally, President Clinton authorized covert actions against bin Laden that included assassination as an option. In an interview with the press shortly after the September 11, 2001 (9/11) terrorist attacks, Clinton said, “At the time we did everything we can do. I authorized the arrest and, if necessary, the killing of Osama bin Laden and we actually made contact with a group in Afghanistan to do it” (Younge, 2001). The Clinton administration overtly

used indirect methods (albeit with more precision than the Libya strikes) in targeting areas where an individual may have been during the cruise missile attacks. In this way they used the same reasoning as the Reagan administration in avoiding implicit violation of the assassination prohibition. Clinton, however, did go a step further in authorizing covert operations targeting an individual (bin Laden) for assassination. Clinton's lawyers determined that the U.S. could go after bin Laden without violating Executive Order 12333, concluding "that efforts to hunt and kill bin Laden were defensible either as acts of war or as national self defense, legitimate under both American and international law" (Risen, 2001).

#### **F. CONGRESS STEPS IN**

Interestingly, well prior to the 9/11 terrorist attacks, Representative Bob Barr (R-Georgia) introduced a bill known as the "Terrorist Elimination Act of 2001." Submitted as H.R. 19 on January 3, 2001, the bill's purpose was "to nullify the effect of certain provisions of various Executive orders," specifically orders 11905, 12036, and 12333. In the bill, Barr proposed the following findings:

- (1) Past Presidents have issued Executive orders which severely limit the use of the military when dealing with potential threats against the United States of America;
- (2) These Executive orders limit the swift, sure, and precise action needed by the United States to protect our national security;
- (3) Present strategy allows the military forces to bomb large targets hoping to eliminate a terrorist leader, but prevents our country from designing a limited action which would specifically accomplish that purpose;
- (4) On several occasions the military has been ordered to use a military strike hoping, in most cases unsuccessfully, to remove a terrorist leader who has committed crimes against the United States;
- (5) As the threat from terrorism grows, America must continue to investigate effective ways to combat the menace posed by those who would murder American citizens simply to make a political point; and
- (6) Actions by the United States Government to remove such persons is [sic] a remedy which should be used sparingly and considered only after all other reasonable options have failed or are not available; however, this is an option our country must maintain for cases in which international threats cannot be eliminated by other means. (H.R. 19, 2001)

Barr proposed nullifying all portions of Ford, Carter, and Reagan's Executive Orders that refer to prohibition of assassination. Initially, Barr had no co-sponsors for his bill. After the 9/11 terrorist attacks, however, 15 other House Representatives joined Barr in sponsoring the bill and it was referred to the Committee on International Relations. According to congressional records, the referral was the last major action taken on this bill (Bill Summary, 2003).

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## **IV. U.S. ASSASSINATION POLICY AFTER 9/11**

### **A. THE DAY THE WORLD CHANGED**

On the morning of September 11, 2001, transnational terrorists belonging to the al-Qaeda organization took control of four commercial passenger jets. The terrorists crashed a plane into each of the World Trade Center's twin towers, crashed another plane into the Pentagon, and crashed the fourth plane into a field in Pennsylvania after passengers struggled with the terrorist for control. All told, the attacks claimed the lives of 3,981 people in the worst single terrorist incident in U.S. history. America's resolve in dealing with terrorists hardened in the face of these attacks, and assassination immediately surfaced as a potential option in responding to terrorist threats. This chapter will address the changes to U.S. assassination policy since 9/11.

On September 15, 2001, the U.S. Congress overwhelmingly authorized President Bush

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United states by such nations, organizations or persons. ("Congress approves," 2001)

The resolution passed by a 420-1 margin, with the lone dissenter being Representative Barbara Lee (D-California), who felt it gave too much of Congress' power to the president and force could make things worse ("Congress approves," 2001). The resolution clearly gave President Bush broad power and authority to target specific individuals involved in the terrorist attacks with lethal force, if "necessary and appropriate." The Bush administration did not, however, change Executive Order 12333 to lift the assassination prohibition.

Despite Congress giving President Bush what appeared to be a "blank check" in prosecuting the war on terror, U.S. intelligence and military actions since 9/11 have continued to fuel the assassination debate. The U.S. is now engaged in both overt and covert action against enemies worldwide, and several of the operations have been high-profile assassination attempts, both successful and unsuccessful. The U.S. has

determined that sub-national terrorists, no matter what their position in their respective organizations, are “enemy combatants,” and thus legitimate targets of lethal force in the “war on terror.” Likewise, the leaders of enemy nations’ combatant forces, such as Saddam Hussein, have been clearly targeted. There has been no attempt to deny the intent of such action, as was common with previous administrations. Even so, the Bush administration has maintained that all of their actions are within the boundaries of international law and the law of armed conflict, and thus do not violate the assassination ban.

#### **B. BUSH (GEORGE W.) AND ASSASSINATION**

Immediately following the terrorist attacks of 9/11, President Bush signed a secret intelligence finding; a legal document authorizing covert action. The finding provided “the basic executive and legal authority for the CIA to either kill or capture terrorist leaders. Initially, the CIA used that authority to search for al-Qaeda leaders in Afghanistan” (Risen & Johnston, 2002). The finding also included a “hit list” of terrorists that the CIA was “authorized to kill if capture is impractical and civilian casualties can be minimized” (Risen & Johnston, 2002). The finding gave broad authority to the CIA to kill or capture al-Qaeda operatives worldwide; targets were not limited to the names on the list, and the president did not have to personally approve each operation or additions to the list (Risen & Johnston). Reportedly, after the initial finding, the CIA expanded the target list and “developed formal rules of engagement for its targeted-killing operations...designed...to make sure that any covert killings comport with U.S. law and with the ‘customary rules of armed conflict’ that are a recognized part of international law under the 1907 Hague Convention and the 1949 Geneva Convention” (McManus, 2003).

On the military side, Defense Department lawyers determined assassination would not be illegal under the Law of War if the targets were “combatant forces of another nation, a guerilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States” (Hersh, 2002). If this rationale looks familiar, it should; in Chapter III, I discussed the first President Bush’s issues with the assassination prohibition during the Panama conflict. He and his advisors used the *exact*

*same* criteria when they decided what would justify assassination, without violating the Executive Order's prohibition.

The CIA and Department of Defense used their newfound authority liberally when tracking down terrorists during Operation ENDURING FREEDOM in Afghanistan. It was a slow start, however, as many of the Clinton-era intelligence and military officials struggled with their unprecedented lack of restrictions after years of paranoia and risk aversion. On one of the first nights of the war in Afghanistan, a Predator UAV equipped with Hellfire missiles located a convoy of vehicles believed to be carrying Mullah Omar, leader of the Taliban. The convoy stopped in front of some buildings and the occupants of the vehicle got out, entering a building that happened to be located next to a mosque. Central Command, in charge of the effort on the ground, agonized over whether to engage the targets. In the end Central Command aborted the strike due to concerns over collateral damage and accuracy of intelligence. Secretary of Defense Donald Rumsfeld was not happy with the hesitance and reluctance to act. He adjusted the rules of engagement to make things easier for commanders, if another opportunity to assassinate a high value target presented itself (Thomas & Klaidman, 2003).

In November 2001, U.S. military and intelligence sources tracked Osama bin Laden's military chief, Muhammed Atef, to a house near Kabul, Afghanistan, where he was meeting with other al-Qaeda officials. A Predator circled overhead while U.S. F/A-18s bombed the site. When personnel attempted to flee the building, the UAV engaged them with Hellfire missiles. Atef was killed in the strike (Samson, 2002).

Some of the assassination operations were not without controversy. In December 2001, a U.S. air strike targeted a convoy of vehicles that the U.S. military believed was carrying high-ranking al-Qaeda and Taliban leaders. The strike destroyed the convoy, but Afghans claimed the vehicles were carrying regional tribal elders into Kabul for new president Hamid Karzai's swearing in as head of the interim Afghan government. The U.S. stood behind the attack, but Afghans said rival tribes fed false information to the U.S. military ("Survivors Say," 2001).

In February 2002, a Predator UAV on patrol in the skies above Afghanistan captured video of a tall man, being "treated with deference" by a small group of people,

who CIA and military officers believed could be Osama bin Laden. The U.S. officers made a request through their chain of command to engage the personnel with The UAV's Hellfire missiles. By the time the strike was approved, the group had dispersed. The Predator soon captured more images of what appeared to be the same tall man walking out of a wooded area, and U.S. officials gave the go-ahead to the Predator. The Predator fired its Hellfire missiles, decimating the area and killing three people. Although the Pentagon maintained the men were al-Qaeda, villagers in the area claimed they were local men scavenging for scrap metal (Hersh, 2002). In May 2002, a CIA Predator attempted to assassinate Afghan Warlord Gulbuddin Hekmatyar (once a major recipient of U.S. aid in the Soviet-Afghan war) with Hellfire missiles, but was unsuccessful (Landay, 2002).

Despite some controversy, all of the actions mentioned so far occurred in Afghanistan, clearly in a theater of war and against individuals the U.S. believed were enemy leaders. The operations were acknowledged by most (including international human rights groups) as legitimate targeting of "enemy combatants." The outlying case that provoked another round of assassination debate was the U.S. Predator UAV strike on November 3, 2002, in Yemen, that killed al-Qaeda operative Abu Ali al-Harithi.

### **C. YEMEN: THE U.S. BREAKS THE PARADIGM**

The U.S. and Yemeni authorities had long sought al-Harithi as a primary suspect in the October 12, 2000 bombing of the USS COLE in Aden harbor that killed 17 U.S. sailors. He was also believed to have served as one of Osama bin Laden's bodyguards (Landay, 2002). In December 2000, Yemeni Special Forces attempted to capture a group of al-Qaeda operatives, including al-Harithi, near the Yemen-Saudi Arabia border. The mission was a disaster; the suspects escaped and 18 Yemeni soldiers were killed (Bowers & Smucker, 2002). A joint U.S./Yemeni intelligence team had been tracking al-Harithi's whereabouts, and had pinpointed his location (using one of his five cellular phones) in a remote desert location in the Marib province. On November 3, 2002, a Predator UAV, launched from nearby Djibouti, located al-Harithi's vehicle and launched a Hellfire missile into it, completely destroying the car and its occupants. Besides al Harithi, the strike killed four men belonging to the Aden-Abyan Islamic Army, a terrorist group with

ties to Al-Qaeda, and one Arab-American from Buffalo, New York who according to the FBI recruited for Al-Qaeda (Hersh, 2002).

The Yemen strike sparked immediate international controversy, though domestically, U.S. citizens and media, as evidenced by the overwhelmingly positive coverage at the time, widely supported the operation. Although only briefly described here, the Yemen episode will appear frequently in the remainder of the thesis. This action was clearly a step in an entirely different direction taken by any previous administration, and serves as a particularly illustrative example of the tensions surrounding U.S. assassination policy

#### **D. IRAQ: TARGETING THE HUSSEINS**

Assassination policy debate continued most recently during the ongoing war in Iraq. Prior to the war, Senator Peter Fitzgerald (R-Illinois) told the Chicago Daily Herald that in a conversation with President Bush, the president had said he would rescind Executive Order 12333 if U.S. forces “had a clear shot” at Saddam Hussein (“U.S. Ducks,” 2003). White House spokesman Ari Fleisher sidestepped press questions but stopped short of total denial, saying, “The president doesn’t recall if he said it or didn’t say it. The staff doesn’t recall the president saying it...I think there is some uncertainty in Senator Fitzgerald’s mind about it” (“U.S. Ducks,” 2003).

From the beginning of Operation IRAQI FREEDOM, however, there was no doubt the U.S. targeted Saddam Hussein and his regime leaders in “decapitation attacks,” firing Tomahawk missiles and dropping precision guided munitions on known leadership and command/control locations. On April 8, 2003, a U.S. Air Force B-1 bomber received orders to bomb a residence in Baghdad where intelligence sources suspected Hussein and at least 20 other regime leaders were gathered. Twelve minutes later the B-1 dropped four 2,000 lb bombs, leaving a smoking, 60-foot deep crater where the residence once stood (Zoroya, 2003). Apparently, however, Saddam escaped death. Ironically, no one was fired for his or her “decapitation” remarks this time, despite Dick Cheney’s position as Vice President.

The killing of Uday and Qusay Hussein again sparked debate over U.S. assassination policy. Uday and Qusay, Saddam Hussein’s particularly nefarious sons,

were the “Ace of Hearts” and the “Ace of Clubs,” respectively, in the U.S. forces’ “Most Wanted” Deck of Cards. The Hussein brothers had been at large since Hussein’s regime dissolved when U.S. forces reached Baghdad in early April 2003, and Uday and Qusay were the subject of an intense manhunt by Task Force 20 (Thomas & Nordland, 2003). Uday and Qusay had hidden themselves in the Mosul mansion belonging to an import-export businessman, Nawaf al-Zaidan. Al-Zaidan tipped off the Hussein brothers’ location to U.S. forces, and on the morning of July 22, 2003, Task Force 20 arrived, backed up by elements of the 101<sup>st</sup> Airborne Division. Task Force 20 attempted to get Uday and Qusay to surrender, calling to them on a bullhorn before entering the building. As they attempted to climb the stairs inside the residence, a hail of gunfire repelled the U.S. commandos, and three soldiers were wounded. Task Force 20 retreated and turned the operation over to the 101<sup>st</sup> Airborne Division’s Strike Brigade, who proceeded to “prep” the building from all sides with .50 caliber machine gun fire, grenades, and helicopter-fired missiles. Around noon U.S. soldiers attempted to enter the building, and were again repulsed by small arms fire. After another hour of intense fire and bombardment, and six hours after the initial engagement, U.S. forces finally gained entry into the mansion, and found Uday, Qusay, a bodyguard and Mustafa (Qusay’s teenage son) dead from multiple bullet and shrapnel wounds (Thomas & Nordland, 2003).

Following the killings, Congressman Charlie Rangel (D-New York) argued, “We have a law on the books that the United States should not be assassinating anybody...We tried to assassinate Castro and we paid dearly for it...and when you personalize the war and you say you're killing someone's kids, then they, in turn, think they can kill somebody” (as cited in “Rangel: U.S.,” 2003). Associated Press writer George Gedda commented, “Pursuing with intent to kill violates a long-standing policy banning political assassinations...It was the misfortune of Saddam Hussein’s sons...that the Bush administration has not bothered to enforce the prohibition” (as cited in Yoo, 2003). Others argued that Uday and Qusay were legitimate targets of lethal force in an armed conflict. “It is perfectly legitimate for the United States to kill Hussein’s sons...just as it is to kill members of the Iraqi military who continue to fight against the coalition...who are enemy combatants in a war with the United States” (Yoo, 2003).

The assassination operations in Iraq have not been without error. On April 10, 2003 (the day Baghdad fell), U.S. jets destroyed a house in Ramadi with six precision-guided bombs. U.S. forces were acting on a tip that Saddam Hussein's half brother, Barzan Tikriti, was at the residence. Instead, the U.S. killed one of the area's tribal leaders, Malik Kharbit (who owned the house), and members of his family (Ignatius, 2003).

### **C. CARRYING BARR'S TORCH**

There have been additional attempts by lawmakers to do away with Executive Order 12333's restrictions. On January 27, 2003, Representative Terry Everett (R-Alabama), introduced H.R. 356, the "Terrorist Elimination Act of 2003," which closely mirrored Representative Bob Barr's bill detailed in Chapter III. It presented almost exactly the same findings, and sought to nullify "Section 2.11 of Executive Order 12333, and any comparable provisions contained in any other Executive order, regulation, or other order of a department or agency of the executive branch" (H.R. 356, 2003). With just two co-sponsors, the bill was, as with Barr's case, referred to the House's Committee on International Relations. The referral was the last known action taken on the bill (Bill Summary, 2003).

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## V. ASSASSINATION POLICY TENSIONS

### A. THE MURKY WATERS

The purpose of this Chapter is to examine the assassination debate in terms of tensions that arise when the U.S. conducts an assassination operation (or what is perceived as an assassination) despite the explicit prohibition of Executive Order 12333 and its predecessors. In *Bullets With Names*, Roger Herbert conducted a thorough analysis of these tensions. He concluded that although assassination has no place in U.S. foreign policy, Executive Order 12333 is dysfunctional and assassination policy requires normalization. A decade later, however, in the post 9/11 world, assassination—as defined by both Herbert in *Bullets With Names* and myself in Chapter II—is not only a valuable tool but also is now considered by some military analysts and leaders as a vital and practical option in the war on terror.

Before wading into the murky waters of assassination debate and tensions, it is important to note that none of the administrations, since President Ford issued the first Executive Order, has debated the ban in terms of assassinating foreign political leaders or heads of state in peacetime. With the one exception of the second President Bush’s “unconfirmed” statement regarding Saddam Hussein (who arguably has been in a perpetual state of conflict with the U.S. since the first Gulf War) detailed in Chapter IV, the U.S. has abided fairly closely by not only the letter but also the spirit of the Executive Order, in the context of eliminating foreign political adversaries without a pre-existing state of overt conflict. The U.S. has violated the explicit and absolute prohibition, however, in the milieu of “hostilities,” overt and covert armed conflict, and the nebulous battleground of the current “war on terror.”

To set the stage for the policy tensions discussion, it is useful to examine the controversy surrounding the November 3, 2002 Yemen assassination mentioned in Chapter IV. The Yemen killings provide an ideal case study for U.S. assassination policy tensions. The strike occurred outside of any specific arena of conflict and involved many controversial factors. On November 8, 2002, Amnesty International wrote letters to President Bush and the President of Yemen, voicing the organization’s concerns over the

Predator strike. As outlined in Chapter II, Amnesty International defines assassinations as extra-judicial executions. In their press release announcing the letters, Amnesty International said, “If this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extra-judicial executions in violation of international human rights law” (“Amnesty International,” 2002). Amnesty International also suggested the U.S. issue a statement saying they do not sanction such extra-judicial executions, bring any U.S. officials involved in such action to justice, and provide full explanation of the role of U.S. personnel in the killing of the six men. Additionally, although Amnesty International “recognizes the obligation of the United States Government to protect its nationals...the prohibition against the arbitrary deprivation of life cannot be derogated from in any circumstances, even in a time of national emergency” (Amnesty International Press Release, 2002).

Anna Lindh, Sweden’s foreign minister (recently herself a victim of assassination), argued the strike was “a summary execution that violates human rights” (as cited in Dworkin, 2002). An unnamed former Clinton administration official warned the U.S. was in danger of becoming, “in fact or perception, judge, jury and executioner around the world” (Dworkin, 2002).

National Security Advisor Condaleeza Rice responded to concerns and criticism after the attack, saying, “We’re in a new kind of war, and we’ve made it very clear that this new kind of war be fought on different battlefields...the President has given broad authority to U.S. officials in a variety of circumstances to do what they need to do to protect the country” (as cited in Dworkin, 2002).

Surprisingly, Human Rights Watch did not totally agree with Amnesty International’s view.

Based on the limited information available, Human Rights Watch did not criticize the attack on al-Harethi as an extra-judicial execution because his alleged al-Qaeda role arguably made him a combatant, the government apparently lacked control over the area in question, and there evidently was no reasonable law enforcement alternative. Indeed, eighteen Yemeni soldiers had reportedly been killed in a prior attempt to arrest al-Harethi. (“Human Rights,” 2003)

The organization did argue, however, that the U.S. made no attempt to officially justify this “war power” use or identify the legal limits of targeted killing of enemy combatants.

It is Human Rights Watch's position that even someone who might be classified as an enemy combatant should not be subject to military attack when reasonable law enforcement means are available. The failure to respect this principle would risk creating a huge loophole in due process protections worldwide. It would leave everyone open to being summarily killed anywhere in the world upon the unilateral determination by the United States (or, as the approach is inevitably emulated, by any other government) that he or she is an enemy combatant. (“Human Rights,” 2003)

An October 16, 2003 *Frontline* episode highlighted another wrinkle in the Yemen assassination. As I mentioned in Chapter IV, one of the people killed was an Arab-American. His name was Kamal Derwish, and his assassination represented “the first public instance of an American citizen killed by the U.S. government in the course of its hunt for Al Qaeda. The attack in Yemen sets a new precedent, whether Derwish was killed intentionally or as the result of collateral damage” (“Frontline: Chasing,” 2003). Derwish’s passport, found near the scene, was reportedly used to aid in the identification of his body, apparently still burning when Yemeni officials arrived on the scene. Although most U.S. officials, including Dale Watson (head of the FBI’s counterterrorism division following 9/11) and Robert Mueller (head of the FBI), refused during interviews to acknowledge any awareness of Derwish’s disposition, Secretary of Homeland Security, Tom Ridge, did have some interesting comments. He did acknowledge Derwish’s death and confirmed Derwish was the subject of discussion within the Bush administration. In reference to the Yemen operation and the hard decisions behind it, Ridge said,

...the decision to engage that vehicle or to engage militarily or using any military assets, those are decisions made by other individuals and other entities outside of Homeland Security. Make no mistake about it, I don't think anybody in the government, in terms of prosecuting the war -- as horrible as these terrorists are and the tragedy that befell upon us on 9/11 and, whatever we feel about them -- still considers it an easy thing to take somebody's life. But if that's what you have to do, under these circumstances of 9/11, to protect America, that's what we have to do. (“Frontline: Chasing,” 2003)

These are extremely complex decisions, especially when faced with “pulling the trigger” on an American citizen, albeit an active terrorist recruiter with alleged ties to al-Qaeda. Obviously, the implications of the U.S. killing one of its own citizens (on foreign soil), without due process or an attempt at apprehension, are enormous. If we give the U.S. government the benefit of the doubt, Derwish was simply in the wrong place, at the wrong time. Otherwise, the U.S. enters the dangerous territory of extrajudicial execution, untenable by any standards of a democratic society upholding the rule of law.

Dissecting the contextual nuances of the Yemen assassination helps illustrate the policy tensions that arise in these cases. First of all, the Yemen operation fits into our definition of an assassination as outlined in Chapter II. It was a deliberate killing of a specific individual (Predator UAV-launched Hellfire missile, at Abu Ali al-Harithi and his cohorts); the state(s) (U.S. and Yemen) perceived al-Harithi as an important enough threat to eliminate when there was no possibility of capture or judicial recourse (a previous attempt at capture resulted in the death of 18 Yemeni special forces soldiers, and according to reports, he was either planning for or on his way to another attack); it was carried out under the authority of a state, and planned and executed using elements of the state’s structure (U.S. and Yemen joint intelligence assets and operatives); it occurred with the intent and motivation to influence or achieve a political or military objective/outcome (self-defense, elimination of a imminent/potential threat, symbolic warning to all terrorists demonstrating the U.S.’s global reach); it happened regardless of whether the state is considered at “war” or “peace” with its perceived enemies (the U.S. was not at war with Yemen, but the Bush administration had declared war on terror).

## **B. MORAL AND ETHICAL DEBATE**

The moral (right vs. wrong) arguments surrounding assassination policy lie distinctly along two lines of thought. As Bruce Berkowitz remarks, “The morality of sanctioned assassination depends mainly on whether and when one can justify murder” (Berkowitz, 2002). On the one side are those who agree with Amnesty International, Anna Lindh, and syndicated columnist Marianne Means, who argued, “State-ordered, premeditated killing across borders without judicial due process is morally wrong” (Means, 2001). Richard Lowry counters this perspective, saying it is “...a moral equivalence that condemns us for trying to kill first the people who are bent on killing us.

It finds it intolerable that we might engage in any difficult or severe action in the course of defeating our mortal enemies..." (Lowry, 2003). Lowry also argues, "Targeted killing can also be morally superior to waging all-out war...Indeed, the idea of proportionality in the law of war suggests that the means able to achieve an objective with the least destruction...is always to be preferred" (Lowry, 2003).

Professor of philosophy Daniel Statman expresses an even more precise view in his article "The Legitimacy of Targeted Killing." He says,

Targeted Killing expresses the appropriate respect for life during wartime...In Targeted Killing, human beings are not killed because they are 'the enemy' but because they bear special responsibility or play a special role in the enemy's aggression. This is particularly true in war against terrorism, where those targeted are personally responsible for atrocities against innocent lives. (Statman, 2002)

Lowry and Statman share similar views to Representatives Barr and Everett, who were concerned that the prohibition on assassination contained in Executive Order 12333 caused U.S. military forces to use far less precise methods to eliminate terrorists, rather than conducting a limited action that would specifically achieve that objective. George Washington University law professor Jonathan Turley advances a similar argument; "It is time to revisit the idea of limited use of assassination to save lives and combat terrorism...the ban on assassination actually encourages the use of military strikes, which don't simply kill the targeted individual but also cause collateral damage" (as cited in "Political Assassination," 2001).

Ethically (right vs. right), assassination may seem like the most precise and moral application of force. However, in most cases the world community would perceive other options, such as capture, as more judicious. Favoring assassination may cause the U.S. to lose its status as the world's premier example of democratic idealism. As a recently retired Special Forces colonel (quoted in Seymour Hersh's *New Yorker* article) commented, "It is not unlawful, but ethics is about what we ought to do in our position as the most powerful country in human history...global assassinations done by the military...define who we are and what we want to become as a nation. Unintended consequences are huge...the perception of a global vigilante force knocking off the enemies of the U.S. cannot be controlled..." (Hersh, 2002). Ethically, global perception

should not constrain actions if a precision, targeted attack will guarantee minimal loss of life on both sides of a conflict. The difficulty lies in accurately predicting the outcome.

### **C. LEGAL DEBATE**

Deconstructing the legal tensions evident in the examination of the Yemen assassination is an extremely complicated endeavor. The strike took place in a foreign country far from what was considered the front lines of the war on terror (at the time, Afghanistan). The U.S. was not at war with Yemen; in fact, the two countries have been active (albeit uneasy) partners in the war on terror since the bombing of the USS COLE in 2000. The U.S. did not give al-Harithi and his cohorts a chance to surrender; in fact, the vehicle's occupants did not even know they were under attack until perhaps a fleeting second prior to their vaporization by a Hellfire missile. Perhaps most significantly, the strike was conducted by neither a military nor law enforcement entity (the CIA is a governmental intelligence organization), and the personnel targeted were not members of a state military organization or formally indicted criminals. These circumstances place the Yemen operation squarely in an ambiguous and obscure area virtually untouched by traditional law conventions.

Domestically, the Executive Order specifically prohibiting assassination has the force of law for all those operating under the U.S. government (Pape, 2002, p. 65). Surprisingly, there are no international laws specifically prohibiting or even addressing assassination (Berkowitz, 2002). There are four international agreements, however, that the international community and legal experts have historically interpreted to encompass assassination issues. The first is the U.N. Charter, which encourages peaceful settlement of disputes. Article 2(4) of the Charter states, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" ("Charter," 1945). Assassinations would normally fall into this prohibitive category. However, Article 51 of the Charter states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations" ("Charter," 1945). The U.S. and Israel have repeatedly invoked this provision when conducting retaliatory or "preemptive" strikes against enemy leaders or individual terrorists who have planned, sponsored, or participated in attacks against them. When the U.S. conducted strikes

against Libya in 1986, President Reagan's Legal Advisor, Abraham Safer, argued the justification lay in "striking back to prevent further attacks" (Pape, 2002, p. 67).

The second international agreement that touches on assassination issues is the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. Intended to ensure governments could function and negotiate during war, the treaty "bans attacks against heads of state while they conduct formal functions, heads of government while they travel abroad, and diplomats while they perform their duties" (Berkowitz, 2002). International law experts agree, however, that once armed conflict begins, heads of state who have tactical control over their armed forces are legitimate targets for lethal force (Weinstein, 2003). Terrorist organizations pose challenges to international law conventions, especially when attempting to determine where terrorist organizations, their members and their actions fit under international law's purview. The 1973 Convention only applies to "officials representing bona fide governments and 'international organizations of an intergovernmental character,'" which would not include members of terrorist groups such as al-Qaeda (Berkowitz, 2002).

The third international agreement is the Hague Convention of 1907, which the international community still uses as the standard to define the "rules of war." Article 23b of the Convention states, "It is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army" ("Hague Convention", 1907). The Convention, however, does not define "treachery," and further obfuscates the issue under Article 24, which permits "ruses of war" ("Hague").

*National Review* editor Richard Lowry believes the general hesitance to endorse assassinations today is due to misunderstanding in interpreting the Hague. This argument brings us back to the "treachery" connotation introduced in Chapter II's definitions discussion. If an assassination could be considered "unlawful" under the conventions of armed conflict, it would have to be conducted using treacherous means. Lowry uses the pre-9/11 killing of Afghanistan Northern Alliance leader Ahmed Massoud as a classic case of treachery. Two of Osama bin Laden's al-Qaeda operatives posed as journalists seeking an interview with Massoud. When they finally got close enough, they detonated

explosives packed inside their video camera case, killing themselves and Massoud. Lowry argues that when critics consider assassination issues, however, they use a much too broad perception of treachery, including any covert or clandestine operation involving precision or stealth (Lowry, 2003).

The fourth international agreement is the Geneva Convention, which is actually a series of conventions codifying multiple aspects of war including treatment of wounded, prisoners of war, and protection of civilians. “Protocol I Additional,” a 1977 expansion to the Geneva Convention of 1949 sought to protect civilians by distinguishing combatants from the population; “lawful” combatants had to either wear a uniform or carry their weapons openly. Otherwise, they would lose their status and protection, if captured, as enemy prisoners of war. The Protocol also prohibits perfidious killing, injury, or capture. It defines perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence” (“Protocol Additional,” 1977). Analysts and legal experts have seen this Protocol as overly constrictive to covert operations.

At times, the nature of assassination may require an operative to mislead an enemy’s confidence in order to execute an assassination...These provisions...would clearly hamper any covert operation including operations which required operatives to commit assassinations behind enemy lines...If the United States was forced to adhere to such a stringent provision, the U.S. would be forced to limit its options in defending U.S. interests abroad. (Moon, 1997)

The U.S. has never ratified the additional protocols (“States Party,” 2003).

The U.S. has incorporated many of the Hague and Geneva Conventions’ principles into U.S. military law of war, and has sought to clarify some of the hazy areas. The U.S. Army Field Manual (FM) 27-10 (“The Law of Land Warfare”) gives treachery a detailed treatment, using perfidy as a benchmark for unacceptable conduct. Any method used to gain “an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith” would qualify as treachery or perfidy (“FM 27-10,” 1956). Also, according to FM 27-10, the Hague’s “treachery” clause, “...is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a



price upon an enemy's head, as well as offering a reward for an enemy “dead or alive.” It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory or elsewhere” (“FM 27-10” 1956). Additionally, when discussing killing the enemy, the U.S. Army Memorandum of Law states, “No distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush...booby trap, a single shot by a sniper, a commando attack, or other similar means” (Lowry, 2003).

Berkowitz argues, “the main legal constraints on sanctioned assassination other than domestic law, which makes murder a crime in almost all countries, are rules that nations impose on themselves” (Berkowitz, 2002). The U.S. is the *only* country to have imposed such a prohibition, currently in the form Executive Order 12333. St. Mary’s University Law Professor Jeffrey Addicott argues, “...Executive Order 12333 really does not make ‘illegal’ something that was not already illegal” (Addicott, 2002). In other words, if assassination is indeed yet another form of murder, then the Executive Order is purely a policy statement rather than actual law. However, there is a major disconnect between U.S. policy and practice. “In short, the unintended result of banning assassinations has been to make U.S. leaders perform verbal acrobatics to explain how they have tried to kill someone in a military operation without really trying to kill him” (Berkowitz, 2002).

The Yemen case reflects the difficulties in determining ground rule for the war on terror, a war that has no solid foundation in traditional war conventions. Self-defense is invoked repeatedly, but questions regarding the imminence of the threat arise when terrorists are killed in the middle of a vast desert, with no potential targets anywhere near the area. Suzanne Spaulding, chair of the American Bar Association Standing Committee on Law and National Security, commented, “The strike in Yemen highlights the difficulty of applying traditional rules of engagement to this non-traditional war...the U.S. government has not adequately explained the parameters of this war...including the definition of the enemy and what counts as a legitimate military target” (as cited in Dworkin, 2002). Spaulding did, however, acknowledge the concept of engaging enemy combatants in the war on terror; “It does seem to me this was characterized as a military

operation in the war on terrorism- not a rhetorical war- and that these are enemy combatants. You shoot to kill enemy combatants” (as cited in Hess, 2002).

Classifying terrorists as enemy combatants is a technically contentious issue, producing charges of policy duplicity. Captured enemy terrorists, interned at U.S. facilities in Guantanamo Bay, are not afforded the rights and protections of prisoners of war. The U.S. argues they are “illegal combatants,” since the terrorists are not operating under the laws of war and are thus not protected by the conventions. Although U.S. officials declined to comment on the details of the Yemen operation, the status of the terrorists as combatants is arguable. The very definition of the term “terrorist” also produces tension in assassination policy. The U.S., in classifying terrorists as combatants, is justified in targeting individual terrorists with lethal force. Many nations (including the U.S. prior to 9/11), however, view terrorists as civilians and terrorism as a criminal act, thus subject to criminal law proceedings. Using lethal force against terrorists without due process could then be interpreted as a violation of domestic and international law (Thiermann & Messing, 2002). This legal gray area is truly central to the assassination debate. The “war on terror” is largely rhetorical since declaring war on an organization or sub-state actors, or a tactic of these entities, defies current international law definitions and convention. The closest fit in international law are those described by the Geneva Convention as “enemies of mankind”—pirates, robbers, outlaws, brigands—whose traditional punishment was summary execution (Owens, 2002).

Another interesting aspect of the Yemen case, which I will explore further in Chapter VI, is the CIA’s role in the assassination. The CIA is not part of the U.S. armed forces, yet the rationale supporting the legality of the Yemen strike depends heavily on the legitimacy of a military operation, using lethal force against enemy combatants. President Bush gave the CIA authority to target members of Al-Qaeda, but when considering law of war arguments the question arises whether the CIA operatives themselves were lawful combatants. If not, “they [the CIA] would not theoretically have the right to participate in hostilities, and their killing of al-Harithi would not be sanctioned under international humanitarian law” (Dworkin, 2002). Additionally, would this mean that CIA operatives controlling the UAV were also fair game as targets of lethal force under the law of armed conflict?

Another consideration is the legality of the presidential finding itself. “As defined in the Hughes-Ryan amendment of 1974 and the Intelligence Oversight Act of 1980, a finding concerns only the use of appropriated funds for covert action by intelligence agencies” (Gellman, 2001). The classification of the findings precludes detailed examination and analysis, but it is possible the basis for the CIA’s assassination operations is a very broad interpretation of congressional law, and is standing on shaky ground.

Legal debate of assassination policy centers on interpretation. One nation, and its supporters, may determine assassinations in certain contexts legitimate action; other nations, international organizations and critics may call assassination a clear violation of law and human rights. Even if an act is technically justifiable, however, political ramifications can cause additional tensions that may make assassination policy unsupportable.

#### **D. POLITICAL DEBATE**

The political frictions surrounding assassination policy are readily apparent in international response to the high-profile assassinations and assassination attempts detailed in Chapters III and IV. In *Bullets with Names*, Herbert remarks,

The assassination ban reflected the temper of the 1970s. The American public no longer perceived the Communist menace as the dominant threat. The greatest threat was internal: a powerful, unchecked and abusive central government. But the times and the threats have since changed. As a result, frictions have developed between the ideals contained in the assassination ban and modern threats to national security. (Herbert, 1992, p. 56)

After 9/11, the U.S. turned a corner in its policy dealings with international terrorists. Al-Qaeda and the organization’s supporters now represented a direct threat to U.S. national security, and the attacks on American soil warranted a forceful, albeit surgical, response. But many saw President Bush’s declared “war on terror” as a nebulous notion; how could the U.S. declare war on a tactic, a concept, which in and of itself escaped precise definition? There has been additional concern that the U.S., in lifting the assassination ban, would act unilaterally in violation of other countries’ sovereignty when pursuing and targeting terrorists. According to Dworkin, U.S. officials (in off-the-record briefings)

have suggested that if necessary they will conduct military operations, including targeted killings, overseas without host country knowledge or consent. Even though the U.S. could claim self-defense, this could constitute a perceived act of aggression (Dworkin, 2002).

On September 20, 2001, the international organization Human Rights Watch sent a letter to President Bush and U.S. Congressional leaders expressing their concern over potential policy changes. The organization was concerned specifically with proposals to end the assassination ban and ease restrictions on CIA recruitment of “abusive” informants. In addressing the assassination ban, Human Rights Watch stated, “A policy of assassination poses a dangerous risk of backfiring—the U.S. as an open society is particularly vulnerable in this regard—and is obviously a blatant violation of the right to life” (Fantom & Roth, 2001). The letter goes on to say that the constraints imposed by the ban are in keeping with U.S. military and law enforcement values, and existing policy does not prohibit the U.S. from targeting military forces, including leaders, if the U.S. engages in armed conflict and prosecutes the war in keeping with international human rights law. The letter points out that international police standards also allow law enforcement officers to use lethal force to defend themselves or others from the threat of imminent death or injury. International and human rights law, however, prohibits execution of noncombatants. Human Rights Watch was also concerned that lifting the ban would circumvent worldwide criminal justice standards. It compared the declaration of a war on terror to the rhetorical war on drugs and organized crime, and encouraged the U.S. to take a criminal justice approach in countries whose law enforcement system was cooperative, with the guarantees of a fair trial (Fantom & Roth, 2001). The letter’s assassination discussion ends with this statement, “Reverting to a policy of assassination would suggest that governments may pick and choose when these guarantees apply—with lethal results—even in countries committed to the rule of law. Such a policy would undermine global commitment to the rule of law and the most basic human rights, and America’s credibility in championing those values (Fantom & Roth, 2001).

Human Rights Watch’s argument is compelling, and America has indeed tested its credibility and democratic values in the international arena, especially with the al-Harithi and Hussein brother assassinations. Overall, most people approved of the Hussein

brothers' demise, although some commentators argued that killing Uday and Qusay was excessive and unnecessary, and their capture could have been an intelligence gold mine for the U.S. (Nordland, 2003). Other than the objections of Amnesty International and Sweden's foreign minister, and a few commentators' complaints, the Yemen strike "was applauded by many Americans, and also by the media, as progress in the war on terrorism" (Hersh, 2002).

A recurring theme in arguments against rescinding or violating the assassination ban has less to do with law or morals than with political wisdom. Almost every anti-assassination argument, including *Bullets with Names*, mentions that assassination attacks could invite retaliation in kind both domestically and internationally on U.S. political and military leaders.

Military conduct thought to be unnecessarily brutal or widely regarded as illegitimate may ultimately result in festering resentment, engender a sense of scores unsettled, and invite retaliation in kind. Those who advocate assassination as an instrument of foreign policy must consider whether America is prepared for the repercussions of its actions. (Herbert, 1992, p. 110)

However, the fact that the U.S. maintains the Executive Order prohibiting assassination clearly did not preclude Saddam Hussein from attempting to kill the first President Bush, (post-presidency) in Kuwait in 1993, or dissuade Osama bin Laden from directing his suicide operatives to try and kill President George W. Bush, any other politician in the White House, or military leaders in the Pentagon during the 9/11 terrorist attacks (Lowry, 2003). The world should know by now that terrorists have zero regard for laws of war, and they do not "play by the same rules" as idealistic nations.

The idea that assassination policy violates perceived democratic norms is strongly advocated by Roger Herbert in *Bullets with Names*.

The degree to which assassination violates democratic principle is arguable. But legalistic debating notwithstanding, the anti-democratic perception which assassination promotes is undeniable. Low cost victories accomplished through an assassin's cross hairs, therefore, will seem ambiguous, transitory and not nearly such a bargain when compared with the costs to America's image in the world. (Herbert, 1992, p. 116)

The 9/11 terrorist attacks changed everything, including democratic perceptions. The destruction of the World Trade Center towers, a wing of the Pentagon building, and the loss of nearly 4,000 lives has sharpened domestic, and to a lesser extent, international resolve in dealing with threats to U.S. national security.

Roger Herbert also brings up the issue of America's self-image. He relates a scenario posed by Brian Jenkins:

Just imagine the President appearing on television one evening to announce, "Some time ago I authorized the assassination of Muamar Qaddafi. I am pleased to report to you tonight that American agents have successfully carried out this mission." (as cited in Herbert, 1992, p. 118)

Herbert claims "the reaction of the American public to such an announcement would be dramatically divided" (Herbert, 1992, p. 118). If today, President Bush appeared on national television to announce the successful assassination of Osama bin Laden or Saddam Hussein, the majority of the American population most likely would rejoice.

#### **E. PRACTICAL CONSIDERATIONS**

Perhaps the most compelling argument illuminating the need for an adjustment in U.S. assassination policy is the absolute nature of the prohibition, which prohibits assassination even though it has vital use as an extremely practical instrument of foreign policy. In 1992, Roger Herbert argued, "The assassination ban, as currently written, is a major obstacle to an effective anti-infrastructure campaign...Assassination, it would seem, is better suited as an instrument in a long term conflagration, also uncharacteristic of recent trends in American warfighting style" (Herbert, 1992, pp. 79, 96). Currently, despite initial quick and decisive battlefield victories, the U.S. is involved in two guerilla wars, in Afghanistan and Iraq. Countering the guerillas' infrastructure-building campaign is vital to counterinsurgency efforts, and assassination of key infrastructure personnel should be an available option, without fear of legal repercussions outside the boundaries of the customary law of war (imposed by prohibitive Executive Orders). There are those who argue the war on terror is akin to an international counterinsurgency campaign. As in a local guerilla conflict, destroying enemy infrastructure is a vital facet to the counterinsurgency campaign, and this includes elimination of terrorist leaders and key "nodes" in the terrorist network. As Herbert argues, "A terrorist organization's only

strategic asset is the terrorist himself. Attrition therefore, is a necessary alternative in a ‘war against terrorism.’ Attriting terrorists, however, will inevitably resemble assassination” (Herbert, 1992, p. 84).

In his book *The Transformation of War*, published in 1992, Martin van Creveld predicts the spread of Low Intensity Conflict (LIC) as the prevalent form of modern warfare. Characteristic of LIC is the organization of war-making groups along charismatic and personal lines; the distinction is blurred between political entities and their leaders. As a result, he projects assassination will become prevalent and accepted as a means to bring pressure to bear against the group. Van Creveld also argues that conventional weapons systems, “are not sufficiently accurate to make much of an impression on an enemy who is extremely dispersed, or indistinguishable from the civilian environment, or intermingled with friendly forces” (van Creveld, 1992, p. 208). Herbert acknowledged van Creveld’s work, noting, “If, as van Creveld suggests, it becomes impossible to conduct a war against an organization without waging war against the leader of the organization, then the assassination ban becomes dysfunctional” (Herbert, 1992, p. 66).

Bruce Berkowitz argues this same point; the nature of today’s threats requires the U.S. to target specific individuals. Terrorist organizations are highly networked, using modern communications and small cells that can organize, group, and regroup flexibly to prepare for an attack. “To defeat such networked organizations, our military forces will need to move quickly, find the critical cells in a network, and destroy them. This inevitably will mean identifying specific individuals and killing them—in other words, assassination” (Berkowitz, 2002). Representative Bob Barr (author of the original “Terrorist Elimination Act” detailed in Chapter III) made the case for not only targeting the terrorist operatives, but also those who finance terrorists, a vital aspect of the terrorist organization’s infrastructure. Barr says, “Under traditional terms of war, those who assist belligerents are belligerents” (as cited in Gellman, 2001).

A decade later, van Creveld’s eerily clairvoyant predictions accurately reflect today’s conflict environment. The war on terror is a battle against a widely dispersed enemy, undistinguishable without good intelligence from the population, and highly

dangerous to the U.S. and its allies. The destructive power available to these small groups and individuals, especially in cases where biological, chemical or nuclear Weapons of Mass Destruction (WMD) may be used, highlights the need for a flexible policy in dealing with people determined to harm as many Americans or “Westerners” as possible. Assassination—when used in the right context and under the correct circumstances—may not just be the most appropriate and practical, but also perhaps the *only* way to deal with these threats. Prohibiting assassination with an absolute, blanket statement contained in an Executive Order ignores the utility, if not the necessity, of having assassination available as a critical option. The current ban on assassination is unnecessarily prohibitive in situations falling outside the legally “excusable” parameters, where eliminating a terrorist or threat outside the prescribed boundaries of armed conflict, as the Yemen case came close to approaching, may be the only choice left to the U.S. in a struggle for national survival.



## **VI. ASSASSINATION POLICY: THE HOW AND THE WHO**

### **A. A FRAMEWORK FOR DECISION MAKERS**

If the U.S. continues to use assassination as a tool of foreign policy, it would be useful to have a practical framework for policy makers to navigate through the tensions described in Chapter V.

Doctor Robert G. Kennedy of the University of St. Thomas in St. Paul, Minnesota has advanced a framework for the justifiable use of force; in his case he was discussing the moral legitimacy of torture. This framework is also useful in building criteria for a justifiable assassination.

Kennedy's first major criteria is that "the person or group employing force must have "Standing to Act." This means that the person or group must have some responsibility for the good to be protected by the use of force" (Kennedy, 2001). Kennedy describes this Standing to Act across the spectrum from broad (almost anyone witnessing an elderly person getting mugged or assaulted would have Standing to Act to intervene and protect that person) to narrow (in disciplining children only parents or close relatives would have Standing to Act) (Kennedy, 2001). In the case of an assassination, this Standing to Act would have to be defined narrowly. Only the highest levels of the U.S. government, and only agents or armed forces of the U.S. with direct authorization and the charter to protect and defend the U.S. would have Standing to Act.

The second major criterion is "Sound Reason to Act." This exists when there is a threat of harm or actual harm being done and includes four additional criteria. The first is discrimination: lethal force may only be used against a person who is known to be a threat or is actively engaging in threatening behavior, especially when directed against people (in this case any citizen of the U.S.). The second is necessity: no non-coercive means are reasonably available and there is a legitimate need for action to be taken. The third is proportionality: the potential or actual threat is serious enough to warrant the use of lethal force, and the force used is proportional to the harm caused (lethal force due to the threat of death to U.S. citizens) and status of the perpetrator (the targeted person plans, authorizes or conducts the threatening action). The fourth and probably the most

controversial criteria is prospect for success: lethal force is limited to situations where the assassination will undoubtedly lead to the anticipated elimination of the specific threat (Kennedy, 2001). General Sir Hugh Beach and David Fisher argue this same point in their policy paper, "Terrorism, Assassination and International Justice." "A cause however just, will not license the use of force unless more good than harm is likely to result, taking into account the probability of success...it is very difficult to foresee all the consequences of one's actions and well-intentioned actions may notoriously issue ill-fashioned results" (Beach & Fisher, 2001).

The third major criterion is "Right Intention in Acting." The person or group using lethal force intends specifically to prevent harm being caused or about to be caused by the targeted perpetrator. Right intention does not include vengeance, obtaining advantage, or exercising power (Kennedy, 2001). As Bruce Berkowitz argues, "The only time we should consider assassination is when we need to eliminate a clear, immediate, lethal threat from abroad" (Berkowitz, 2002). Kennedy also brings up an important additional point;

The use of force...always marks a breakdown in the peace and harmony that ought to characterize human relationships. It causes damage that may not be immediately apparent and sometimes that damage later fuels still further erosions of peace and harmony. It can never be chosen lightly and it must always be employed to restore an authentic and just peace. While force is sometimes a necessary tool, it is also a dangerous one for families...to employ. (Kennedy, 2001)

This view emphasizes, as with the "necessity" requirement of "Sound Reason to Act," that lethal force should only be used as a last resort.

Beach and Fisher argue "last resort" does not require that all other available (non-violent) means have been exhausted. "This would often be a recipe for military disaster, where the early application of limited force may prevent the need for wider application of force later" (Beach & Fisher, 2001). Rather, the "last resort" concept applies if there are no other viable options available, and assassination is the only way to prevent a target's future acts of violence. Osama bin Laden and al-Harithi are good examples of this reasoning; attempts to apprehend them had been thwarted before the U.S. decided to use assassination. In bin Laden's case, the Taliban refused to hand him over despite the

international community's demands. In al-Harithi's case, an earlier attempt to apprehend him resulted in the death of 18 Yemeni soldiers.

Another important consideration is the price of *inaction*. If a certain iniquitous individual is left unchecked, what is the potential for even greater harm to innocent people or the security of a nation? The power of small groups or individuals to cause extreme damage- especially in the arena of chemical, biological or nuclear attack- requires precise and personal options to halt the progress of a potentially devastating attack. The destructive impact of an attack involving WMD would be of unimaginable proportions.

Analysts Oliver Thiermann and F. Andy Messing Jr. of the National Defense Council Foundation argue for stringent requirements in practicing assassination as a tool of foreign policy.

The main concern behind the removal of the assassination ban is how we would deal with it. The attacks on September 11 have clearly illustrated we have to change how we combat and engage new threats in this post Cold War period. As the president correctly said in the days following September 11, it is a "Special Operations War." Accordingly, we should act without restraint. If we enact a proviso, it should have built in exacting congressional and even judicial oversight. It should allow for assassination only where there is a clear and extreme threat to national security, especially the hostile proactive use of Weapons of Mass Destruction. (Thiermann & Messing, 2002)

Thiermann and Messing mention a final piece of the framework also advocated by Roger Herbert in *Bullets with Names*. This is congressional and judicial oversight, or at the very least a forum for debate and decision using America's democratic institutions. A formalized process involving U.S. lawmakers could provide as a check/balance for an executive branch in cases where a president may be tempted to use assassination unilaterally, without deliberate and proper consideration of the nuances and consequences. The oversight could take the form of a streamlined Congressional committee, specifically designed to review, debate, and vote on presidential assassination decisions. The president would have, as with any legislative action, veto power, but at least the assassination policy will not have been generated in vacuum.

The last piece of the assassination decision framework is answering the crucial question of whether the U.S. is willing to accept the risks and costs of using the assassination option. “We should be clear in our own minds that, when the United States tries to assassinate someone, we are going to war—with all the risks and costs that war brings” (Berkowitz, 2002). These include the moral/ethical, legal, political and practical tensions detailed in Chapter V. This idea that assassination is an act of war raises another policy question that will be addressed separately, later in this chapter. Acts of war should be considered military operations, so who should physically execute assassination policy, U.S. military or intelligence operatives?

In summary, if the U.S. rescinds or modifies the assassination prohibition, decision makers should be able to satisfy six criteria prior to targeting specific individuals with lethal force. First, does the U.S. have Standing to Act; does the U.S. government have the responsibility to protect its citizens from the targeted individual(s), using only those institutions entrusted with the protection of the U.S. to carry out the assassination? Second, does the U.S. have Sound Reason to Act; is there an imminent or actual threat, and is the assassination discriminatory, necessary, proportional, and guaranteed to succeed? Third, does the U.S. have Right Intention in Acting; is the assassination designed to prevent harmful action rather than to extract revenge or retribution? Fourth, what is the Price of Inaction; if the individual is *not* assassinated, will even greater harm result? Fifth, has the assassination decision been subject to America’s democratic institutions of debate and review, rather than a single decision at the direction of the president? Sixth, is the U.S. willing to accept the consequences of an act of war? If policy makers run through this framework in considering the assassination option, it is highly likely they will have thoroughly considered all the tensions, the practical aspects, and consequences of this highly controversial and important decision.

## **B. TESTING THE FRAMEWORK: THE YEMEN CASE**

A useful exercise is to examine the al-Harithi (Yemen) assassination to determine whether, using the above outlined framework, decision makers would have arrived at the same conclusion to carry out the Predator strike. First, the U.S. and Yemen definitely had Standing to Act. Al-Harithi was implicated in the death of 17 sailors after the bombing of the USS COLE and suspected in the death of 18 Yemeni soldiers who

attempted to capture him. Both the U.S. and Yemen had responsibility to protect their citizens from further attack from this dangerous individual, and the two governments used their state structure—military and intelligence operatives—to conduct the mission. Second, both the U.S. and Yemen satisfied most of the requirements for Sound Reason to Act. Considering imminence or actual threat, Al-Harithi was reportedly in the process of planning for or even on his way to conduct another attack, evidenced by the fact that the Hellfire missile impact caused secondary detonations from weapons and explosives in the vehicle (Hersh, 2002; Landay, 2002). The discriminatory issue is more controversial; there were five other people in the car with al-Harithi. U.S. and Yemeni officials did not know who these people were before engaging the target, although according to reports, during the operation the Predator did wait until men and women separated into two different vehicles and only targeted the vehicle with men aboard (McManus, 2003). The necessity of the assassination once again speaks to earlier fatal attempts to capture a dangerous terrorist. Proportionality-wise, the threat posed by al-Harithi was definitely serious enough to warrant lethal force, and al-Harithi had already, albeit allegedly, harmed U.S. and Yemeni citizens. There was little doubt this assassination would be successful; the strike occurred in wide-open desert, with lethal and precise tactics, using a platform (the Predator UAV/Hellfire missile combination) that the U.S. had tried and tested successfully in Afghanistan. Thirdly, Right Intention in Acting is again controversial; some could argue this was a clear act of retribution for the USS COLE, meant as a symbolic act, warning terrorists around the world they were not safe from the U.S.'s lethal power. The flip side of this argument is that al-Harithi was no doubt a clear, immediate and lethal threat who had already proven himself difficult and dangerous to apprehend using non-lethal means.

The Price of Inaction is not so clearly defined and highly speculative, but based on past suspected behavior al-Harithi was a dangerous individual under any circumstances. Was the Yemen assassination decision subject to America's democratic institutions of review and debate? Due to the highly classified nature of the post 9/11 intelligence finding, the level of satisfaction for this criterion is unknown. CIA officials maintain that their current covert operations have many layers of oversight. The president's finding, and a more detailed description of the mission, "is sent to the

congressional intelligence committees. If they object to an operation, they can cut off its funds the next time the agency's budget comes up" (Waller, 2003). Although the connection between purse strings and policy is indirect, it does represent at least some form of checks and balances between the executive and legislative branches. Lastly, it was clear the U.S., in cooperation with Yemen, was willing to accept the costs and risks of assassinating al-Harithi. In conclusion, despite a few "gray areas," the Yemen assassination appears to satisfy most of the framework parameters I have proposed in this chapter.

### **C. WHO SHOULD CARRY OUT ASSASSINATION POLICY?**

If assassination is to be considered an act of war, the issue of who in the U.S.'s government infrastructure is best suited to conduct assassinations is especially contentious. Bruce Berkowitz argues, "Because assassination is an act of war, such activities should always be considered a military operation. American leaders need to resist the temptation to use intelligence organizations for this mission" (Berkowitz, 2002). Berkowitz contends that intelligence organizations such as the CIA are outside the military chain of command, and thus are not expected to obey—nor are they protected by—the rules of war. Intelligence organizations are also not law enforcement entities, and using the CIA to conduct assassinations can too closely resemble Amnesty International's "extra-judicial executions;" capital punishment with no due process (Berkowitz, 2002). Representative Porter J. Goss (R-Florida), chairman of the House Intelligence Committee, raised concerns in an interview with the *Los Angeles Times* about the CIA's increasing role in paramilitary operations.

There's going to be tension between when it is 'military' and when it is 'other,' ...what are the new ground rules about using lethality [in] what we used to call covert action? How much capability will be thrown to nonmilitary agencies? I think there is still ambiguity. (as cited in McManus, 2003)

Although most argued the Yemen strike was within the boundaries of the law of armed conflict, there are a few contradictions in the "war on terror" that immediately arise; the target is al-Qaeda (not a state), and many of the assassinations have been conducted by the CIA (not "lawful" combatants of a military force).

The CIA was initially (and justifiably) reluctant to autonomously carry out a broad targeting killing campaign, based on the authority reportedly granted by the president in the intelligence finding following 9/11. The agency, however, “is willing and believes itself able to take the lives of terrorists designated by the president (Gellman, 2001). In Chapter V, we discussed the legal tensions surrounding the findings and the CIA operatives’ status as combatants, but the CIA has learned from its past internal agony. “The agency is determined to leave no room this time for ‘plausible denial’ of responsibility on the part of the president and the agency’s top management. That does not mean that operations will be publicly proclaimed...but that the paper trail inside the government must begin undeniably with ‘the political leadership.’” (Gellman, 2001).

The CIA now has several hundred officers in its paramilitary branch, including ground, maritime and air operatives—the air arm includes the Predator drones that conducted several strikes in Afghanistan and Yemen—and is expanding its operations into areas normally occupied by the military’s Special Operations Forces. This has created tension between the CIA and Department of Defense. Secretary of Defense Donald Rumsfeld has been frustrated by the lack of cooperation and accountability of CIA operatives, and has reportedly planned for the creation of a similar unit to the CIA within the Department of Defense, accountable only to him (Waller, 2003). There has been additional criticism of the general idea of CIA agents conducting paramilitary operations, when they should be focusing on intelligence collection and dissemination to military units who are better trained and equipped to conduct the missions. David Wise comments,

The CIA would be much better served by getting out of the paramilitary business altogether and strengthening its clandestine intelligence gathering. It was, after all, created to avoid another Pearl Harbor. It should concern itself now with preventing another 9/11. (Wise, 2003a, p.32)

In an attitude reflecting fallout from the Vietnam-era CIA operations such as the Phoenix Program, Rumsfeld “does not like the idea that the CIA’s paramilitary operatives could start fights his forces might have to finish” (Waller, 2003).

Frederick P. Hitz, inspector general of the CIA from 1990 to 1998 argues the CIA is not used to the role the president is directing them to play.

After fifty-plus years, the CIA is an organization of bureaucrats...This is not what intelligence officers do. They're not trained for it. And the intermediary stuff is what went to hell in times past. If you got out and hire a bunch of brass knuckle types...it strikes me that throws in the hopper all the things we learned about this bit of business in the Church committee investigations. (as cited in Gellman, 2001)

If the CIA is not the force of choice for assassination operations, the U.S. military is the natural best option. U.S. armed forces have highly trained, elite units, well capable of conducting clandestine or covert, highly precise, lethal missions against selected individuals. In *Bullets with Names*, however, Roger Herbert argues against using the military personnel as assassins, especially when the killing involves political officials who fall outside the normal realm of an adversary in combat. "Killing a political official...is ethically tantamount to intentionally killing an ordinary citizen—murder. When soldiers become assassins, therefore, they must hurtle 'moral fortifications' established by military tradition" (Herbert, 1992, p. 98). Herbert feels this erodes the conventions of war, and will place the soldier/assassin outside the protection of the laws of war. "Placing an American serviceman in this dubious status is morally contentious in any circumstance other than a struggle for national survival" (Herbert, 1992, p. 100).

Sources within the CIA claim its paramilitary operatives "take on the jobs the military can't or won't handle" (Waller, 2003). Resistance exists within the U.S. military against conducting an assassination campaign using military personnel. According to Seymour Hersh's *New Yorker* article, on July 22, 2002, Rumsfeld issued General Charles Holland, commander of U.S. Special Operations Command, a secret directive ordering Holland "to develop a plan to find and deal with members of terrorist organizations...the objective is to capture terrorists for interrogation or, if necessary, to kill them, not simply to arrest them in a law-enforcement exercise" (Hersh, 2002). Rumsfeld has allegedly been frustrated by Holland's caution and reluctance to attack specific targets due to lack of "actionable intelligence." Internal Defense Department memos reportedly noted, "The worst way to organize for the manhunt...is to have it planned in the Pentagon...Our prerequisite for 'actionable intelligence' has paralyzed us" (Hersh, 2002). Rumsfeld has



considered restructuring Special Operations as its own service/agency, reporting to him and capable of conducting covert and clandestine operations normally carried out by the CIA. Some military officials, however, have argued that turning Special Operations Forces into “hunter-killer teams” would atrophy other vital skills and force special operators to enter into a potentially politically explosive (domestically and internationally) arena of killing specific people for political effect (Hersh, 2002). As an active-duty three-star general related to *Newsweek* magazine, “Nobody relishes the prospect of appearing before the [Sen. John] Kerry congressional committee of inquiry in 10 years’ time” (as cited in Thomas & Klaidman, 2003).

The internal debate seems highly ironic when we review history, and see that the U.S. military has been used repeatedly in strikes against leadership targets. In most of these cases, however, the killing has been remote and has not required the “face-to-face” element of a “traditional” assassination. A former military official, who participated in the Bush administration’s internal discussions of targeted killings, stated, “When you’re dead, you’re dead...if the means of killing you is a .22-caliber bullet or a Hellfire missile, it makes no difference” (as cited in McManus, 2003). The indirect methods popular with previous administrations prior to 9/11 fit into the parameters of military operations against “command and control” targets of enemy nations. The current war on terror, however, demands military action against less clearly defined adversaries. In using *any* government organization to conduct a targeted killing campaign, U.S. policy makers will continue to face resistance and controversy without clearly defining the new parameters that allow U.S. military or intelligence forces to operate in such a personal manner when engaging enemy combatants.

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## VII. THE ISRAELI EXAMPLE

### A. AN ENVIABLE POSITION?

Our analysis of assassination policy would be incomplete without some discussion of Israel and its assassination policy. As the U.S. has progressed in its war on terror, the inevitable comparisons to Israel's own fight against terror have arisen, especially considering Israel's policy of unapologetically targeting individual terrorist leaders and infrastructure. Israel's assassination policy is deserving of a thesis topic all of its own, but the Israel example is useful in examining the characteristics and discussing the arguments of a sustained assassination campaign.

As Roger Herbert relates in *Bullets with Names*,

Some Americans, frustrated by a world of pirates, chieftains and Third World crusaders, look with envy toward Israel. Israel operates in an environment comparatively free from the moral restrictions which the United States has voluntarily shouldered. Military response, therefore, need not be considered through the cryptic lens of perceived world opinion. Old Testament justice is sanction enough. (Herbert, 1992, p. 115).

Herbert feels this envy is misplaced, however, since Israel earned a reputation as somewhat of a "pariah state" due to its "eye for an eye" policies; this is a reputation the U.S. should avoid. Herbert highlights the differences between the two nations. Israel is a relatively small nation that fights on a daily basis for survival against enemies who would welcome its extinction. The dangers are powerful and imminent enough to produce a domestic consensus on the methods, often including assassinations, the Israeli government uses to counter the threats. But the U.S., Herbert argues, "is a huge country with non-threatening neighbors. Its dominant imperative must transcend simple survival...Calculating utility based exclusively on comparative body count estimates disregards American history which still embraces as heroes those who killed and died for democratic ideals" (Herbert, 1992, p. 116).

Some analysts, such as Naval Postgraduate School's Defense Analysis Department Chair, Gordon McCormick, have argued the U.S. is now engaged in a global counterinsurgency against powers that seek to eradicate U.S. influence and values from

the world scene. If this is the case, then perhaps Israel's example does have some relevance to the U.S.'s war on terror and its fight to retain democratic institutions and freedoms.

## **B. THE WRATH OF GOD**

Israel's campaign of assassination against terrorists had its genesis during the 1972 Munich Olympics, when Arab terrorists kidnapped and killed eleven Israeli athletes. In an operation dubbed "The Wrath of God," Israeli agents and government forces systematically tracked down and assassinated those deemed responsible for, or even remotely implicated in, the murders. The campaign, with a list of 35 targeted individuals, was independent of time or international border constraints; Israeli agents conducted multiple assassinations all over the world including countries such as France, Italy, Greece, and Switzerland, amongst others. The assassinations were not without error. A widely publicized blunder occurred on July 21, 1973, when Israeli agents killed Ahmed Bouchiki, a Moroccan waiter, in front of his pregnant wife on the streets of Lillehammer, Norway. The Israelis had mistaken Bouchiki for Black September terrorist Ali Hassan Salameh. Nor were the assassinations always successful. Israeli agents tracked the top commander, Abu Daoud, to Warsaw, Poland in 1981, and shot him multiple times at point-blank range in a hotel lobby. Daoud somehow survived (Wolff, 2002).

Israel's assassination campaign did not end with "Wrath of God." Israel sought to quell the intifada (the uprising in Palestinian occupied territories from 1987-1993) through strategic assassinations that would weaken the PLO leadership. Commandos killed the head of the Palestinian Liberation Organization's (PLO) military branch, Khalil al-Wazir (known as Abu Jihad), in Tunisia in April 1988. "The attempt to influence strategic developments by means of an isolated military strike failed, and the intifada continued for another five years" (Luft, 2003). The 1993 Oslo peace accords changed the relationship between Israel and the PLO from adversaries to potential peace partners, ending military action against PLO activists and unofficially pardoning pre-Oslo era terrorists. Israel continued, however, to respond to innumerable terrorist attacks in a retaliatory fashion by killing specific individuals alleged to be responsible, especially people belonging to terrorist groups Hamas, Palestinian Islamic Jihad, and Hezbollah.

### **C. THE AL-AQSA INTIFADA AND ASSASSINATION**

What is generally known as the “al-Aqsa intifada” commenced in September 2000. It began when the Palestinian Authority, deliberately defying Israel, unilaterally released eighty Hamas and Palestinian Islamic Jihad prisoners (serving sentences for involvement in terrorist attacks). Tanzim, the armed militia of the Fatah movement, took the lead in shooting and suicide attacks against Israeli civilian targets. In the first year of the al-Aqsa intifada, Israel responded with at least forty assassinations of mid to high-level Palestinian activists, the first being the November 9, 2000 Israeli Apache helicopter strike against a Tanzim leader near the West Bank town of Bethlehem (Luft, 2003). The situation has gradually settled into the exchanges of violence characteristic of today’s Palestinian-Israeli conflict, with suicide bombing attacks against Israeli civilians followed by Israeli retaliatory strikes. The strikes have taken many forms, although Israel only claims responsibility for the overt assassinations. There have been several Arab individuals killed by car bombs, sniper bullets, and other unexplained “accidents,” but Israel has remained silent unless it is an obvious government-sanctioned attack (Luft, 2003). On February 4, 2001, Israel’s Deputy Defense Minister Ephraim Sneh stated, “We will continue our policy of liquidating those who plan or carry out attacks, and no one can give us lessons in morality because we have unfortunately 100 years of fighting terrorism” (as cited in Amnesty International, 2001).

Collateral damage appears commonplace in many of the Israeli strikes; on July 22, 2002, Israel assassinated Salah Shihada, founder and leader of Hamas’ military wing, using a one-ton bomb dropped from an F-16 in a densely populated area in Gaza City. The attack drew widespread international criticism as the attack also killed fifteen civilians, including nine children (Luft, 2003). This is just one example of several Israeli strikes in populated areas, especially the Palestinian occupied territories, which have resulted in civilian deaths (Amnesty International, 2003).

### **D. INTERNATIONAL CONDEMNATION**

Israel’s assassination operations in the Palestinian Occupied Territories have been especially contentious. Amnesty International is one of the main human rights organizations that have voiced strong opposition to Israel’s targeted killing policy. In a recent report, Amnesty International comments,

Since November 2000, when the first extrajudicial execution is known to have been carried out in the context of the current Palestinian uprising or intifada, more than 100 Palestinians have been assassinated by members of the Israeli army and security services. In the course of such attacks, the IDF (Israeli Defense Forces) and security services have killed scores and injured hundreds of other Palestinian men, women, and children bystanders. (Amnesty International, 2003)

The report does acknowledge Israel's main arguments supporting the assassinations. According to Israel, in the context of an "armed conflict" with Palestinian militants, the laws of war permit Israel's actions. The assassinations are necessary and justified since there was no other way to arrest or capture individuals in Palestinian areas, and they were "ticking bomb cases" where the individuals were on their way to an attack (Amnesty International, 2003). However, Amnesty International disputes these arguments, contending that the targeted personnel were far removed from potential Israeli targets; Israel has conducted numerous overt and covert captures within the occupied territories in the past, and could have easily apprehended the targeted personnel (Amnesty International, 2003).

Amnesty International also argues Israel's actions violate international humanitarian and human rights law. Israel is the "Occupying Power" in the "Occupied Territories" of the West Bank and Gaza Strip, and the Palestinian populations in these territories are "Protected Persons." Israel claims its obligations under international law do not extend to these territories, but U.N. committees have rejected this view. Israel's actions violate the Fourth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War), since according to the Convention the Palestinian militants who fight Israeli forces are only unprotected "for the duration of the armed engagement...they cannot be killed at any time other than while they are posing an imminent threat to lives. Proof or suspicion that a person participated in an armed attack at an earlier point does not justify...targeting them for death later on [and they] may not be assassinated as punishment or as a preventative measure" (Amnesty International, 2003). Amnesty International also points to the International Covenant on Civil and Political Rights and U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions as references for Israel's violation of international law. Additionally, Amnesty International claims Israel deliberately puts civilians at risk "with

the practice of carrying out attacks on busy roads and densely populated areas, knowing that it would be virtually impossible not to hurt bystanders,” which is also a violation of international law (Amnesty International, 2003).

Amnesty International’s reports and demands that Israel halt its assassination campaign seem to have gone unheeded by the Israeli government. Since the report was published, Israeli forces have continued to respond to suicide attacks and other killings by Palestinian militants against Israeli civilians with multiple raids and targeted killing strikes in Palestinian territories. As recently as September 10, 2002, Israel targeted the Gaza home of senior Hamas member Mahmoud Zahar. Zahar escaped with minor injuries, but the strike killed his son and a bodyguard, and injured about 25 people. (“Timeline: Mid-East,” 2003). However, a recent mutiny of sorts occurred within the IDF when 27 Israeli pilots, some of whom regularly conduct combat missions, made a joint statement saying, “We, veteran and active pilots...are opposed to carrying out the illegal and immoral attack orders of the sort that Israel carries out in the territories...We are refusing to continue to attack innocent civilians” (“Rebel Israeli,” 2003). The pilots came under severe criticism from the Israeli government, although they are not the first to express criticism of Israel’s policies and refuse to conduct military operations in the occupied territories. Over the last few years, there have been hundreds of Israeli soldiers who have opted to go to jail rather than serve in the Palestinian territories (“Rebel Israeli,” 2003).

#### **E. DEFENDERS OF ASSASSINATION**

After the Zahar assassination attempt, Harvard law professor Alan Dershowitz wrote an article that essentially counters Amnesty International’s arguments. He contended,

...there can be absolutely no doubt of the legality of Israel’s policy of targeting Hamas leaders for assassination. Hamas has declared war against Israel. All of its leaders are combatants, whether they wear military uniforms, suits or religious garb. There is no realistic distinction between the political and military wings of Hamas, any more than there is a distinction between the political and military wings of al-Qaeda...Under international law, combatants are appropriate military targets until they surrender. (Dershowitz, 2003)

Dershowitz goes on to argue that Israel should limit civilian deaths, but collateral damage is permissible in proportion to “the importance of the military objective...Preventing terrorist leaders from planning, approving or carrying out acts of terrorism against innocent civilians is an important and appropriate military response” (Dershowitz, 2003).

Other proponents of Israel’s assassination policy argue targeted killing is essential in effectively fighting terrorist organizations. Gal Luft argues, “True, terror persists despite the assassinations, and the policy does have its shortcomings. What is less apparent is the profound cumulative effect of targeted killing on terrorist organizations. Constant elimination of their leaders leaves terrorist organizations in a state of confusion and disarray” (Luft, 2003). Luft compares the fight against terror to fighting car accidents; “One can count the casualties but not those whose lives were spared by prevention” (Luft, 2003).

Steven R. David presents both sides of the targeted killing argument and a thorough treatment of the subject in his article, “Fatal Choices: Israel’s Policy of Targeted Killing.” David says, “There is no question that Israel’s policy of targeted killing has hurt the capability of its Arab adversaries to prosecute attacks against Israel” (David, 2002, p. 6). Using the 1995 assassination of Islamic Jihad leader Shikaki in Malta as an example, he contends the assassination of terrorist group leaders can undermine the organization’s efficacy. Islamic Jihad was ineffective for several years as successors struggled over power and policy. He also argues that Palestinian terrorist organizations confine leadership, planning and tactical skill to a few key individuals, and assassinations degrade the capability to organize and carry out attacks. David also contends assassination keeps terrorists on the run, acts as a deterrent, and is popular with the Israeli public (David, 2002, pp. 6-8).

In presenting the counterargument, David points out the fact that the assassinations have actually led to more Israeli deaths, especially in recent years during the al-Aqsa intifada. He says,

Targeted killings have provoked murderous retaliations, eliminated individuals who might have become pragmatic negotiators for peace, diverted the resources of intelligence agencies away from existential threats, “burned” informers, generated international condemnation,



recruited new volunteers for terrorist acts, enhanced the standing of organizations whose leaders have been marked for death, and promoted the unity of groups confronting Israel. (David, 2002, p. 12)

Surprisingly, David concludes despite all the strong arguments against targeted killing, Israel should continue using it as a tactic. He argues that targeted killing is not the same as assassination; assassination carries a pejorative connotation with implied disapproval, whereas targeted killing more accurately describes what the Israelis actually do. Targeted killing policy upholds “just war” traditions due to its discriminate and proportionate nature. Targeted killing gives the Israeli public a sense of revenge, which keeps Israeli society from being demoralized after withstanding repeated, unanswered attacks. Because it is state-sanctioned revenge, anger at the government is dissipated by the real pursuit of justice. Retribution is a valuable action for the government to punish those who have inflicted violence on others. Also, targeted killing is the “least bad” option Israel can pursue in its response to terrorism. If targeted killing can accomplish the goal of rooting out terrorists, as opposed to large and controversial IDF incursions into Palestinian territories, Israel can avoid the resentment and additional collateral damage associated with such action. Finally, David argues “it is far too early to declare targeted killing an ineffective or failed policy...the absence of a short or even medium term benefit does not mean that targeted killings will not, over the long haul, eventually undermine the infrastructure of terror constructed by the Palestinians” (David, 2003, p. 21).

#### **F. RELEVANCE TO THE U.S.**

Israel’s targeted killing policy has major relevance to the U.S.’s own fight against terror. The U.S. can learn a great deal about combating terrorist threats from the Israeli approach. As David observes, “If the Israelis have embarked upon a successful approach, it makes sense to emulate them. If Israeli policy is fundamentally flawed, however, better to understand that now, especially when voices demanding that terrorists be hunted down and killed have grown so loud” (David, 2002, p. 1).

Of note is the U.S. response to Israel’s targeted killing campaign. The Bush administration has repeatedly condemned Israel’s targeted killing policy, although there have been some exceptions. In August 2001, U.S. Vice President Dick Cheney discussed

Israel's assassination policy with Fox News, saying, "If you've got an organization that has plotted or is plotting some kind of suicide bomber attack, for example, and they have evidence of who it is and where they're located, I think there's some justification in their trying to protect themselves by preempting" (as cited in Luft, 2003). During a press briefing the next day with White House spokesman Ari Fleisher, journalists repeatedly peppered Fleisher about the administration's debatably inconsistent stance. Fleisher maintained the administration was "in unison" about the Israeli issue and "it is the policy of the United States to oppose these killings" ("Press Briefing," 2001). After the July 2002 Israeli F-16 strike in Gaza City, State Department Spokesman Richard Boucher said, "As we've said before, we've made it repeatedly clear that we oppose targeted killings" (as cited in Boot, 2002). When asked what the difference was between Israel's actions and the U.S.'s similar operations in Afghanistan during a press briefing following the incident, Ari Fleisher argued, "It is inaccurate to compare the two...the crucial difference...being...this was a deliberate attack against a building in which civilians were known to be located" ("Press Briefing," 2002). After the November 2002 Yemen assassination, the press asked Boucher whether U.S. policy against targeted killings had changed. Boucher responded, "Our policy on targeted killing in the Israeli-Palestinian context has not changed...the factors we cited for our opposition to targeted killings were particular to that set of circumstances" (State Department, 2002).

David offers four improvements to Israeli targeted killing that may be relevant to the U.S.'s own assassination policy. First, he suggests Israel should accept responsibility and be "open and unapologetic" in its moral and legitimate response, in the form of targeted killing to terrorist attack. Second, Israel must conduct targeted killings along stringent guidelines using democratic institutions for oversight, in order to avoid degeneration into savagery that makes the policy worse than the terrorist threat it seeks to counter. Third, Israel must draw the distinction between combatants and political leaders, and refrain from killing the latter. Fourth, Israel must publicly announce that the targeted killing campaign is a temporary weapon of war in an armed conflict, and the killings will end when the Palestinian Authority makes true peace with Israel. Targeted killing is a "necessary evil," a means to an end, and should never substitute for a political settlement (David, 2002, pp. 21-22).

In the war on terror, the U.S. has entered into similar arenas of ambiguity as the Israelis. International law does not adequately address the gray area between war and peace. Israel is in an armed conflict with Palestinian militants much like the U.S. is in an armed conflict with al-Qaeda members, but neither the Palestinians nor al-Qaeda are states with armies. Amnesty International's concerns about extra-judicial executions are valid, especially when considering Israel's occupied territories and the vast desert of Yemen in which both areas' "protectors" allowed assassination operations to occur within their borders. In both cases, however, international condemnation does not offer a prescriptive alternative, and the countries facing the threats must use the "least bad" option in protecting themselves from further attack.

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## VIII. CONCLUSIONS AND RECOMMENDATIONS

### A. PENETRATING THE HAZE

Assassination in the modern world is an extremely complex issue requiring detailed thought and analysis in formulating policy. To review our own study, first we discussed Roger Herbert's *Bullets with Names*, which captured the assassination debate over a decade ago and provided a springboard to launch our analysis. Herbert argued assassination had no place in American foreign policy, but the Executive Order ban was dysfunctional and assassination policy required normalization. Next we tackled assassination's definitional issues, establishing parameters and criteria that satisfied all possible connotations. We discussed assassination policy before and after the September 11, 2001 terrorist attacks, and examined the moral, ethical, legal, political and practical considerations that create policy tensions. We developed potential frameworks for policy makers to follow in making assassination decisions. We debated which government institutions were best suited to carry out assassinations. Finally, we discussed the Israeli assassination campaign and the controversy surrounding it over the last three decades.

Let us return to Roger Herbert's argument that assassination has no place in American foreign policy. In Chapter II, I described how Herbert came to his conclusions, with three arguments for and six arguments against assassination. I would add a few more arguments of my own to Herbert's *supporting* U.S.-sponsored assassinations. First, the nature of the threat the U.S. faces today requires an option for swiftly and precisely dealing with small groups or individuals who may have disproportionate destructive power in their grasp. Assassination may not only be the best option, but also the lone method for stopping a stateless, "noncombatant" but highly dangerous individual bent on mass destruction. The U.S. can ill afford to be shackled by concerns and semantics in getting around the assassination ban to quickly address and prosecute the threat. The current administration may have no problem with this scenario, but future, less bold and indecisive administrations may find themselves tied up in knots by the current rules.

Second, the U.S. is involved in what amounts to a long-term, global counterinsurgency campaign. Chris Seiple, Naval Postgraduate School graduate and President of the Institute for Global Engagement argues,

We are in fact engaged in a three-front global counterinsurgency against very specific people and organizations. The first front is the attack on the terrorists themselves and their infrastructure. The second front is the attack on the conditions that make terrorism a viable weapon for our adversaries. The third front is the public diplomacy that explains the first two in a way that builds American credibility and legitimacy, in part, through making this war everyone's and not just America's (Seiple, 2003).

This first front requires the freedom to strike specific terrorists with lethal force wherever and whenever the U.S. is able. This may include operations that may qualify as traditional violations of national sovereignty, as U.S. forces cross international borders, or, as in the Israel Occupied Territories and Yemen cases, violations of traditional "protected persons" conventions.

Third, the U.S. is now living the reality of Martin van Creveld's predicted arena of modern warfare, where Low Intensity Conflict is the norm, even in the aftermath of initially successful conventional campaigns such as Afghanistan and Iraq. The enemy is dispersed and intermingled with the civilian population, requiring a degree of precision more suited to a sniper's bullet than to a 2,000 lb JDAM. A war-fighting organization's leaders are a critical target set of the overall campaign in battling threats to U.S. national security. For the first time in U.S. history, sub-state actors outside the normal conventions of war and conflict threaten America's national security. Assassination is a discriminate, proportionate method critical to effectively prosecuting these threats.

In disagreeing with assassination as a tool of foreign policy, Herbert outlines six arguments, several of which are no longer relevant or valid. Many, including Herbert, argue that if the U.S. practiced assassination it would invite retaliation in kind. Although this seems to be true in the Israeli case (though one could argue Israel fits into the "chicken or egg" argument as to who provoked who first), the Executive Order prohibiting assassination has not been a major factor in encouraging the U.S.'s enemies to be less lethal against U.S. officials, military or civilian, or take moral considerations into planning their attacks against innocents. As to an assassination operation's highly

complex character with no guarantees of success, the Yemen case demonstrates the effectiveness of a well-planned, intelligence-driven mission with highly successful results. This degree of precision and target identification is difficult, but not impossible. The U.S. has the capability to successfully conduct targeted killing operations with a high degree of discrimination and minimal collateral damage.

The difficulty with identifying who would carry out assassination policy remains, but both CIA operatives and military units have overcome a lot of the bureaucratic inertia and risk aversion that caused hesitation in the early days of the “war against terror.” Both intelligence and military units are capable and to some degree willing to conduct assassinations, but the gray areas of what constitutes armed conflict and who is a lawful combatant calls the current mode of operation—presidential findings authorizing lethal covert action—into question.

Herbert’s argument that assassination as an option in foreign policy may erode democratic norms may have applied in the early 1990s, but is no longer relevant to a country that demands justice after the loss of almost 4,000 innocent people in a single morning on September 11, 2001. Steven R. David points out some interesting poll results amongst both Israel and the U.S.’s democratic populations when asked about targeted killing policies in 2002. 65 percent of Americans polled supported Mideast assassinations, even though 40 percent felt assassinations would increase the likelihood of retaliation from terrorists. Likewise, only 19 percent of Israelis polled felt targeted killings had decreased terrorism, but more than 70 percent of Israelis supported the policy (David, 2002, p. 18). These counterintuitive results suggest both the U.S. and Israeli populations desire for revenge, retribution, and justice outweigh concerns about security or democratic norms. Targeted killings, or assassinations, may actually be the “least bad” of all responses, in keeping with democratic values due to these actions’ proportionality and discrimination. These qualities may make assassination the *most* moral application of lethal force. Additionally, the U.S.’s credibility around the world, especially after the recent Iraq invasion, is a much larger issue than what assassination debate encompasses or influences.

Herbert's contention that an assassination's desired outcome cannot be guaranteed, and that those who fill in for the assassinated individual may prove worse, stands as a valid criticism. This is why assassination cannot be used in lieu of the other tools of statecraft when dealing with uncooperative foreign heads of state. Assassination has no place in foreign policy in the context of eliminating important foreign individuals outside of armed conflict. The current assassination ban, however, makes no distinction between war and peace, says nothing about the status of any individual as a combatant or anything else, and makes no definitions. Yet the policy is absolute; by strict interpretation what seems like the most legitimate targeting of an individual enemy combatant, even in a war, is a clear violation of the Executive Order. The ban simply does not address or reflect the nuances and complications of today's conflict environment.

## **B. POLICY PRESCRIPTION**

International law does not adequately address assassination, or the modern conflict milieu, where wars between nations and sub-state actors are becoming the norm. The U.S. can set the stage and cut through this blurry reality by adjusting assassination policy to reflect today's threat environment. First, I recommend a new Executive Order that refines the prohibition on assassination. It could read as follows: *No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination of foreign heads of state. The United States, however, reserves the right to conduct targeted killing operations in accordance with the law of armed conflict against hostile individuals who threaten the security of U.S. citizens, regardless of the conflict environment or the individual's status as a legal armed combatant or sub-state enemy of mankind.* The Executive Order could go on to define assassination and targeted killing, emphasizing that they are basically the same thing, the major difference being the connotation (or as Steven R. David describes it, "semantic baggage") implied by the words. In defining "hostile individuals" the Order would also clarify that foreign heads of state are legitimate targets in an armed conflict, and hostile individuals include terrorists, who fall into the category of "enemies of mankind" and are thus legitimate targets of lethal force. In keeping with the law of armed conflict,



although “treachery” is prohibited, normal “ruses of war” are fair game, thus assassination can be as covert, clandestine, and “up close and personal” as it needs to be.

Second, I recommend institutionalizing the decision framework advocated in Chapter VI. This could take the form of a select congressional committee specifically designed to rapidly assemble, quickly review the situation, and forward recommendations, although the final decision would rest in the hands of the president.

Third, I recommend the U.S. administration publicly announce the changes to U.S. assassination policy, emphasizing that assassination will be used only after careful deliberation, with proper oversight, and as a temporary instrument in a war against threats that require this type of measured response.

As Steven R. David says (and we can substitute “assassination” for “targeted killing” since they really are the same thing just different connotations),

Targeted killing is an unsavory practice for an unsavory time. It can never take the place of a political settlement...targeted killing stands out as a measured response to a horrific threat. It is distinctly attractive because it focuses on the actual perpetrators of terror, while largely sparing the innocent. For a dangerous region in an imperfect world, the policy of targeted killing must remain a necessary evil. (David, 2002, p. 22)

The U.S. can learn from Israel’s example, and in doing so must be careful to avoid the perception of conducting “extra-judicial executions” and disregarding civilian lives. If the U.S. can clearly articulate its policy, and balance the tensions while allowing itself freedom to engage in specific threats, it should escape international condemnation.

Finally, the U.S. should only conduct assassinations within the parameters of an armed conflict. The lone exception is the largely rhetorical “war on terror;” in any major terrorist or WMD scenario, the U.S. should feel free to engage, with lethal force, any individual planning, coordinating, or executing such an attack. The U.S. should use either military forces or intelligence operatives attached to military forces. The intelligence operatives should be under special agreements affording them the status, rights and protections given to combatants. Whether in the context of the declared “war on terror,” where the U.S. conducts assassinations in accordance with the prescribed decision framework against members and supporters of al-Qaeda, or in a more

conventional armed conflict such as Operation IRAQI FREEDOM, where the U.S. targets key leaders to affect the course of the battle, the U.S. should limit its use of assassination and refrain from conducting purely political assassinations against enemies who pose no direct threat other than inflamed rhetoric and diplomatic, political, or military bluffing.

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